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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD G. WALLACE, JR.,
REPUBLIC MINERAL CORPORATION

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the District Court err in applying state procedural law instead of federal law to deprive petitioners of their constitutional right to a jury trial? The FDIC filed a motion for summary judgment to enforce a complex settlement agreement involving a note, the validity of which was contested. Wallace and RMC counterclaimed that the note was invalid and that the settlement agreement was induced by fraud and produced as a witness the FDIC officer who negotiated the settlement who signed an affidavit that Wallace and RMC had been misled into signing the settlement agreement by false promises that the note would be renewed when it came due. The District Court struck the affidavit as being inadmissible under Texas law as an exception to the parol evidence rule because "trickery", as determined by the Court, was not involved. This decision conflicts with this court's decisions in *Brady v. Southern Ry. Co.*, 64 S.Ct. 232, 230 U.S. 476, 88 L.Ed. 239 (1913), and *Lyon v. Mutual Benefit Health & Accident Assn.*, 59 S.Ct. 297, 305 U.S. 484, 83 L.Ed. 303 (1939) rehearing denied, 59 S.Ct. 459, 306 U.S. 667, 83 L.Ed. 1062 (1939).

II.

Did the District Court err in finding that FDIC met its initial burden of production demonstrating the absence of genuine issues of material fact as required by Fed.R.Civ.P. 56(c) and this Court's decision in *Celotex Corp. v. Catrett*, 106 S.Ct. 2505, 477 U.S. 317, 91 L.Ed. 2d 202 (1986) when their motion did not make any attempt to negate Wallace and RMC's counterclaims of fraud but relied solely on the settlement agreement, although a party in interest, the FDIC official who negotiated the settlement, admitted under oath that Wallace and RMC had been misled into signing the settlement agreement by FDIC's false promises to extend the note when it came due, and the FDIC had sole possession of facts to refute or explain FDIC's actions?

III.

Did the District Court err in applying improper evidentiary standards required to raise a jury issue in a summary judgment proceeding and in failing to find disputed issues of material fact contrary to Fed.R.Civ.P. 56(c) defined by the Supreme Court in *Adickes v. S.H. Kress & Co.*, 90 S.Ct. 1598, 398 U.S. 144, 26 L.Ed. 2d 142 (1970) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)?

IV.

Did the District Court err by not viewing the evidence in the light most favorable to respondents by failing to indulge every reasonable inference in their favor as required by Fed.R.Civ.P. 56(c) and this Court's decisions in *Celotex Corp. v. Catrett, Anderson v. Liberty Lobby, Inc.*, and *Adickes v. S.H. Kress & Co.*, supra?

V.

Did the District Court err in summarily entering judgment against Wallace and RMC on their counterclaims contesting validity of note and the settlement agreement, based solely on fact that settlement agreement contained pre-dated releases admitting validity of the note, in view of the fact that the releases had been placed in escrow and would not have been effective if FDIC had lived up to its promises to extend the note, and none of those counterclaims had been addressed in FDIC's motion for summary judgment? This decision conflicts with the procedural requirements of F.R.Civ.P. 56(c).

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NO. _____

IN THE

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OCTOBER TERM, 1992

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Petitioners,

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Edward G. Wallace, Jr. ("Wallace") and Republic Mineral Corporation ("RMC")[1] petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming a summary judgment of the United States District Court of Texas at Houston in favor of the Federal Deposit Insurance Corporation ("FDIC") enforcing a settlement agreement on a note and summarily dismissing counterclaims filed by Wallace and RMC

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[1]No parties appeared in the proceedings before the District Court of the Court of Appeals except those shown in the caption above.

contesting the validity of the note and alleging that the settlement agreement had been procured by fraud.

FDIC's motion for summary judgment failed to negate Wallace and RMC's counterclaims of fraud but relied entirely on pre-dated settlement documents which would not have been removed from escrow if FDIC had lived up to its false promises. Wallace and RMC produced as summary judgment evidence three affidavits, including one from Robert E. Brooks, the FDIC official who negotiated the settlement, verifying the fact that Wallace had been induced to enter into the settlement agreement by FDIC's false promises. Overruling a Magistrate's recommendation that summary judgment be denied, the District Court concluded that the admissibility of the affidavits were determined by Texas procedural law rather than federal law and struck the affidavits making the factual finding that "trickery" was not involved and therefore the affidavits were not admissible as exceptions to the Texas parol evidence rule. The Court then entered summary judgment against Wallace and RMC on their counterclaims although these issues were not addressed in FDIC's motion for summary judgment.

OPINIONS BELOW

The Opinion of the Court of Appeals, styled *Federal Deposit Insurance Corporation, Plaintiff-Appellee, Counterclaim-Defendant, v. Edward G. Wallace, Jr. and Republic Mineral Corporation, Defendants-Appellants, Counterclaim-Plaintiffs* is reported at 975 F.2d 227 (5th Cir. 1992) and appears in Appendix A. The Memorandum and Order of the District Court dated November 14, 1989 is unreported and appears in Appendix I.

JURISDICTIONAL GROUNDS

The District Court had original subject matter jurisdiction over this case pursuant to 12 U.S.C. § 1819. The Court of Appeals had jurisdiction over this case pursuant to 28 U.S.C. § 1291 because this is an appeal from a final decision of the United States District Court for the Southern District of Texas, Houston Division.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The only statutes involved are the jurisdictional provisions set forth above.

The Seventh Amendment to the United States Constitution preserves the right of trial by jury to litigants in federal courts.

STATEMENT OF THE CASE

RMC is an independent oil company. Wallace is its president. RMC had a credit agreement with Continental Illinois National Bank and Trust Company of Chicago ("CINB") since 1971. The credit limit was based on the value of RMC's oil and gas reserves. Between 1984-1985 CINB reduced its estimates of RMC's borrowing base from $34 million to $9.5 millon on the same properties, called a $20 million note and forced RMC to sell its oil and gas properties at depressed prices to avoid bankruptcy. Without additional consideration, on October 30, 1984, Wallace was forced by CINB to assume part of RMC's debt and sign a personal note for $4 million, and RMC was forced to guarantee the note. The note was renewed three times. CINB became bankrupt and the note was assigned to FDIC on April 14, 1987. On October 30, 1987 FDIC filed a diversity suit in federal court against Wallace on the note, and against RMC as guarantor. Wallace and RMC filed affirmative defenses and counterclaims questioning the validity of the note and seeking damages against FDIC for breach of the credit agreement, duress, failure to act in good faith and deal fairly, economic coercion and fraud.

In November, 1987, FDIC, acting through its Vice President, Robert S. Brooks ("Brooks"), offered RMC and Wallace a settlement package: the parties would enter into a forbearance agreement to stay litigation over the validity of the note; Wallace and RMC would admit validity of the note and execute pre-dated releases of all prior claims against FDIC; Wallace would execute deeds to some lots he owned in River Oaks, Houston, Texas and some oil and gas properties in Ohio and Louisiana to be held as security for payment of the note; and the deeds, and releases would be held in escrow and not delivered out of escrow if the note was renewed. To induce Wallace and RMC to sign the releases, Brooks orally assured Wallace and D. Chris Barden ("Barden"), Vice president of RMC, that the note would be renewed when it became due on June 1, 1988 if Wallace was unable to secure additional financing. Relying on Brooks' assurances, the confidential and fiduciary relationship between the parties and the high standard of conduct expected from Brooks as a government agent, on November 30, 1987 Wallace and RMC executed the forbearance agreement, releases and deeds, which were placed in escrow.

Although Wallace's interest payments were timely paid, FDIC refused to extend the note when it came due on June 1, 1988 and on that day caused

the deeds to be recorded, and the releases to be delivered out of escrow. Three days later, on June 3, 1988, FDIC filed a motion for partial summary judgment against Wallace on the note and against RMC as guarantor. FDIC's only summary judgment proof consisted of two affidavits, one from the escrow agent and the other from an FDIC banking officer, attaching copies of the settlement documents. Wallace and RMC filed counterclaims reviving their damage claims against CINB and FDIC and contesting FDIC's motion for summary judgment with affidavits from Wallace, Barden and Brooks proving that Wallace and RMC had been induced to release their claims as to the validity of the note, and to execute the forbearance agreement, deeds, and other documents by the fraudulent promises, misrepresentations and material concealments made by Brooks that the note would be renewed on June 1, 1988 when it came due if Wallace had not obtained new financing. FDIC made no effort to negate the claims that the note had been originally procured by the fraudulent actions of CINB, or that the settlement agreement had been fraudulently induced, but relied solely on the pre-dated releases FDIC had obtained in the settlement agreement.

Although several hearings were held before a Magistrate and the Court on FDIC's summary judgment motion, the FDIC made no effort to deny or explain the admissions of Brooks, a party in interest, or to demonstrate that fraud in the inducement was not a material fact issue, although FDIC had sole possession of facts that would resolve the issue. Instead, FDIC relied solely on legal arguments that the three affidavits were inadmissible under the Texas parol evidence rule.

The summary judgment motion was submitted to a Magistrate who, on August 4, 1989, recommended denying the motion because a material fact issue, fraud in the inducement, had been raised. On November 15, 1989, the District Court overruled the Magistrate and granted FDIC's motion, finding that FDIC had met its summary judgment burden under F.R.Civ.P. 56(c) by merely filing the forbearance agreement, releases and other documents and struck the three affidavits as being inadmissible to show fraud in the inducement under the Texas parol evidence rule. The Court interpreted the Texas parol evidence rule to require a showing that "trickery" was involved in order to admit the affidavits, and also interpreted the Texas procedural rule to require the Court to make the factual determination as to whether "trickery" was involved.

On April 20, 1990, FDIC filed a second motion for partial summary judgment to establish the amount of deficiency which was granted. On August 2, 1990 final judgment was entered, which included a summary judgment that

Wallace and RMC take nothing on their counterclaims against FDIC, although the FDIC motion did not address this issue.

On September 4, 1990 Wallace and RMC filed amended *motions for* new trial, which were overruled. The Court of Appeals affirmed the case on October 20, 1992.

REASONS FOR GRANTING THE WRIT

The right of litigants in federal court to a trial by jury is insured by Amendment 7 to the United States Constitution. Litigants can not, by state rules of procedure be deprived of this fundamental right. Therefore, whether an issue should be submitted to a jury is a federal question. The summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure, if properly applied, guarantee this constitutional right.

As shown below, the District Court made several errors that violated F.R.Civ.P. 56, and deprived Wallace and RMC of their right to a trial by jury.

I.
The District Court erred in relying on Texas Procedural Law in Striking the Affidavits

The Court erroneously followed what it perceived to be Texas law in making its factual determination that the affidavits of Wallace, Barden and Brooks were not admissible as exceptions to the parol evidence rule because they failed to show "trickery" as a matter of law. Litigants in federal court can not, by state rules of procedure, be deprived of their constitutional right of trial by jury. The question of whether a jury issue had been raised under F.R.Civ.P. 56 is a federal question. *Lyon v. Mutual Benefit Health & Accident Ass'n.*, 59 S.Ct. 297, 305 U.S. 484, 83 L.Ed. 303 (1939), *rehearing denied,* 59 S.Ct. 459, 306 U.S. 667, 83 L.Ed. 1062 (1939); *Brady v. Southern Ry Co.*, 64 S.C. 232, 230 U.S. 476, 88 L.Ed. 239 (1913). Although this is a diversity case, federal procedural rules must be applied as to this issue. *Bernhardt v. Richardson-Merrell, Inc.*, 892 F.2d 440 (5th Cir. 1990).

II.
The FDIC Failed to Meet its Initial Burden of Production

The FDIC failed to meet its initial burden of production as required by F.R.Civ.P. 56(c) since it did not attempt to negate Wallace and RMC's claims of fraud in the inducement although an FDIC official had admitted making false and misleading statements that Wallace and RMC relied upon to their detriment and FDIC had sole possession of facts showing why such false statements were made. A conclusion can be easily drawn that FDIC could not deny that fraud had occurred.

Summary judgment shall not be granted if the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show that there is a genuine issue as to any material fact. Fed.R.Civ.P. 56(c). The party seeking summary judgment always bears the burden of establishing the nonexistence of a genuine issue and must identify those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); WRIGHT, MILLER, & KANE, FEDERAL PRACTICE and PROCEDURE § 2727, p. 121. Failure to establish an absence of a genuine issue is fatal to summary judgment. *Royal Aviation v. Aetna Casualty & Surety Co.*, 770 F.2d 1298 (5th cir. 1985); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970).

The non-moving party is not required to produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp. v. Catrett*, supra at 91 L.Ed. 2d 274.

Nor were Wallace and RMC required to depose Mr. Brooks, their own witness. *Celotex Corp. v. Catrett*, supra at 91 L.Ed. 2d 275.

As Justice Breman pointed out in his dissenting opinion (joined by Justices Burger and Blackmon) in *Celotex Corp. v. Catrett*, at 91 L.Ed. 2d 279, when a movant seeks summary judgment on the ground that the non-moving party has no evidence, a conclusory assertion that the non-moving party has no evidence is insufficient. "If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the Court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the non-moving party."

The FDIC here failed to make even a "conclusory assertion" that Wallace and RMC had no evidence to prove its case of fraud. Instead, it relied solely on an evidentiary attack on the affidavits based on Texas procedural rules of evidence.

III.
The District Court Applied Improper Evidentiary Standards and Failed to Find That Material Issues of Disputed Facts Were Raised by Wallace and RMC

The District Court erred in failing to find that an issue of material fact had been raised by the affidavits of Wallace, Barden and Brooks, applying the legal principles set forth in *Adickes v. S.H. Kress & Co.*, supra.

Under Texas law, fraud in the inducement is a defense to enforcement of a contract. See *Turner v. Houston Agricultural Credit Corp.*, 601 S.W.2d 61, 64 (Tex.Civ.app.--Houston [1st Dist.] 1980, *writ ref'd n.r.e.*); *American Imagination Corp. v. W.R. Pierce & Assoc., Inc.*, 601 S.W.2d 147, 148 (Tex.Civ.App.--El Paso 1980, *no writ*); *Centronics Financial Corp. v. El Conquistador Hotel Corp.*, 573 F.2d 779, 782 (2d Cir. 1978); *Millerton Agway Coop., Inc. v. Briarcliff Farms, Inc.*, 17 N.Y.2d 57, 268 N.Y.S.2d 18, 21, 215 N.E.2d 341, 343 (1966); *Hunt v. Bankers Trust Co.*, 689 F.Supp. 666 (N.D.Tex. 1987); *Town North National Bank v. Broaddus*, 569 S.W. 2d 489 (Tex. 1978). This defense is a rule of substantive law governing in this case under *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The District Court, in striking the affidavits under the parol evidence rule, because they did not prove to the Court's satisfaction, "trickery", mistakenly treated the summary judgement as though it was a trial on the merits and invaded the province of the jury. F.R.Civ.P. Rule 56 expressly permits affidavits for the limited purpose of raising fact issues, but they are not intended to replace a trial on the merits. The affidavits of Wallace, Barden and Brooks, together with the other summary judgment evidence in the case, were sufficient to raise a material fact issue in a summary judgment proceeding under F.R.Civ.P. Rule 56.

As this Court stated in *Anderson v. Liberty Lobby, Inc.*, supra, at 91 L.Ed. 2d 212:

> Our prior decisions may not have recited the same language in describing genuine factual issues, but it is clear enough from our recent cases that at the summary judgment stage the Judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

The issue in a summary judgment proceeding is whether the information they contain (as opposed to the affidavits themselves) would be admissible at trial. WRIGHT, MILLER & KANE, FEDERAL PRACTICE and PROCEDURE § 2738, page 470. The District Court erred in not finding as the Magistrate did, that a issue of fraud in the inducement was raised by the three affidavits when considered in light of all of the other summary judgment evidence in the case. A reasonable jury could infer fraudulent inducement from the admission of Brooks, a party in interest, that Wallace had signed the note and releases in reliance on his assurances that the note would be renewed, and the fact that the note had not been renewed as promised. If so, this was a valid defense to the note under Texas substantive law and met the requirements of F.R.Civ.P. 56 (e) under federal procedural law.

This Court has held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Certainly, the admissions of a party in interest that FDIC had made false promises to Wallace and RMC that had misled them into signing the settlement documents is as much evidence to infer a jury verdict of fraud in the inducement as there was to show a conspiracy in Adickes by the presence of a policeman.

IV.
The Court Failed to View the Summary Judgment Evidence in the Light Most Favorable To Wallace and RMC

The District Court erred by not viewing the evidence in the light most favorable to Wallace and RMC, respondents in the summary judgment proceeding and indulging every reasonable inference in their favor as required by *Celotex Corp. v. Catrett*, *Anderson v. Liberty Lobby, Inc.*, and *Adickes v. S.H. Kress & Co.*, supra

In reviewing a motion for summary judgment on appeal, the Court of Appeals must view the evidence in the light most favorable to the party resisting the motion. Any doubt as to the existence of a genuine issue of

material fact should be resolved against the movant. *Williams v. Adams*, 836 F.2d 958 (5th Cir. 1988); *Williams v. Shell Oil Company*, 677 F.2d 506 (5th Cir. 1982) *cert. denied* 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 933 (1982).

V.
The District Court Erred in Entering Summary Judgment Against Wallace and RMC Since the FDIC Motion Failed to Address This Issue

The Court erred in entering a summary judgment against Wallace and FDIC on their counterclaims for damages against FDIC and CINB on the sole basis of the rejected affidavits and pre-dated settlement agreement since the FDIC motion judgment did not address these claims.

The District Court assumed that the Forbearance Agreement and other documents executed on November 30, 1987 could be set aside for fraud without affecting the validity of the Note itself. This reasoning is flawed. The original lawsuit that spawned the Forbearance Agreement involved the validity of the note and counterclaims against FDIC and CINB for damages. The Forbearance Agreement and all related documents - the note, deeds and assignments, releases and escrow agreement - were all inextricably tied together.

Having isolated the note from the other agreements executed on November 30, 1987 and having assumed the Note's validity, the Court then applied the "narrow" Texas parol evidence rule and made the factual determination that there was no "trickery" involved and struck the affidavits. The Court then summarily disposed of Wallace and RMC's counterclaims as though there had been a trial on the merits.

The District Court had no discretion to enlarge its power to grant summary judgment beyond the limits prescribed by Fed. R. Civ. P. 56. *National Screen Serv. Corp. v. Porter Exchange, Inc.*, 305 F.2d 647 (5th Cir. 1962). The court does not have the discretion to resolve disputed factual issues. The Court's only duty is to determine whether a genuine issue remains for trial. Once it determines that a triable issue exists the inquiry is at an end and summary judgment must be denied. WRIGHT, MILLER & KANE, § 2728 pages 186-187.

CONCLUSION

If this case stands, it will add to the confusion that now exists, in summary judgment cases,as to the evidentiary standards that are required to

raise a jury issue, and the trial courts' responsibility in determining whether a jury issue has been raised. The danger is that summary judgment proceedings will degenerate into full blown paper trials on the merits before the court and will deprive litigants in federal courts of their constitutional right to a jury trial, thus undermining the usefulness of the summary judgment procedure. In this case, the District Court clearly invaded the province of the jury and weighed the evidence to determine whether FDIC's false promises amounted to "trickery" in compliance with what the court perceived to be Texas law. Had the Court properly applied federal law it should have found that the respondents had indeed raised a jury issue under F.R.Civ.P. 56(c).

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APPENDIX A

F.D.I.C. v. WALLACE
Cite as 975 F.2d 227 (5th Cir. 1992)

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee, Counterclaim-Defendant,
v.
Edward C. WALLACE, Jr.
and
Republic Mineral Corporation, Defendants-Appellants,
Counterclaim-Plaintiffs

No. 91-2,524.

United States Court of Appeals, Fifth Circuit.
Oct. 20, 1992.

Holder brought action against maker of promissory note and guarantor, seeking to recover on the note after maker failed to pay the note when it became due. Holder filed motion for partial summary judgment. The United States District Court for the Southern District of Texas, Melinda Harmon, J., struck the affidavits and entered summary judgment on note in favor of holder. Maker and guarantor appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that, under Texas law affidavits submitted by maker of promissory note were not admissible under the fraud in the inducement exception to the parole evidence rule, even though affidavits tended to show that holder made oral representations to maker that he would not be held liable where there was no evidence that holder employed any trickery, artifice, or device in addition to the representation that maker would not be held liable.

Affirmed.

Jack Vickrey, Vickrey & Associates, Houston, Tex., for defendants-appellants, counterclaim-plaintiffs.

Mark D. Goranson, Jeffrey L. Joyce, Winstead, McGuire, Sechrest & Minick, Houston, Tex., for plaintiff-appellee, counterclaim-defendant.

Appeals from the United States District Court for the Southern District of Texas.

Before KING, WILLIAMS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Edward G. Wallace, Jr., and Republic Mineral Corporation (RMC) appeal a grant of summary judgment in favor of the Federal Deposit Insurance Corporation (FDIC). Finding no error, we affirm.

I.

Wallace, president of RMC, executed a promissory note (the Note), guaranteed by RMC, in favor of Continental Illinois National Bank (CINB) for $4 million on August 30, 1984. CINB extended the Note three times, and under the third extension agreement, the Note became payable on April 1, 1987. On April 14, 1987, CINB conveyed the Note to the FDIC but continued to act as administrator of the Note for the FDIC. When Wallace failed to pay the Note when it became due, the FDIC filed this suit on October 30, 1987.

The parties tried to settle the lawsuit by way of a forbearance agreement and other related agreements (together, the "Forbearance Agreement"), executed on November 30, 1987, in which the FDIC agreed to refrain from foreclosing on the collateral securing the Note and to stay the litigation against Wallace for a period of six months ending June 1, 1988. In exchange, Wallace and RMC admitted the validity of the Note, reaffirmed their respective obligations thereunder, and released all existing claims against the FDIC. Wallace also deeded property into escrow as security for payment of the Note. If the Note were paid or renewed by June 1, 1988, the FDIC would return the deeds to Wallace; otherwise, the FDIC would record the deeds and pursue any deficiency on the Note.

Wallace did not pay the amount due by June 1, so the FDIC recorded the deeds and reinstated this litigation. On June 3, the FDIC filed a motion for partial summary judgment against Wallace on the Note and against RMC as guarantor, relying upon Wallace's admission of liability and release in the Forbearance Agreement.[1] Wallace[2] counterclaimed, asserting that the FDIC

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[1]The FDIC sought judgment on all issues except the amount of the deficiency on the Note and the amount of attorneys' fees for which Wallace and RMC are liable. After the entry of partial summary judgment on November 14, 1989, the FDIC sought final summary judgment on the remaining two issues. On May 29, 1990, the court granted summary judgment to the FDIC as to the amount of the deficiency. In its final judgment order of July 31, 1990, the court decreed that the FDIC could

had procured his participation in the Forbearance Agreement by fraud when an FDIC vice-president, Robert Brooks, orally assured Wallace that if Wallace were unable to secure additional financing, the FDIC would renew the Note when it came due on June 1.

In support of his counterclaim, Wallace submitted affidavits from himself, Brooks, and D. Chris Barden, a vice-president of RMC. Wallace swore that he had met with Brooks, in Brooks's capacity as a representative of the FDIC, to discuss the Forbearance Agreement, that Brooks orally assured Wallace that the FDIC would extend the June 1 maturity date, and that Brooks's promise induced Wallace to execute the Forbearance Agreement. Barden swore that he was present when Brooks. on behalf of the FDIC, promised further extensions of the Note before Wallace executed the Forbearance Agreement. Brooks swore that he had led Wallace to believe that the FDIC would renew the Note if Wallace could not pay it off by June 1.

The FDIC moved to strike the affidavits, arguing that because the Forbearance Agreement's terms are clear and unambiguous, the Texas parol evidence rule bars the introduction of prior or contemporaneous oral discussions and negotiations that alter its terms. A magistrate considered and rejected the FDIC's motion to strike finding the affidavits admissible as exceptions to the parol evidence rule on the basis of *Town N. Nat'l Bank v. Broaddus,* 569 of S.W.2d 489, 493 (Tex.1978), which allows the admission of parol evidence to show fraud in the inducement of a promissory note if the fraud involves trickery. Concluding that these affidavits establish disputed issues of material fact, the magistrate recommended that partial summary judgment be denied.

The district court disagreed, finding that the three affidavits Wallace introduced pertained solely to the Forbearance Agreement and thus presented no summary judgment evidence on Wallace's underlying liability on the Note. With respect to the Forbearance Agreement, the court decided that under the *Broaddus* exception to the parol evidence rule, the affidavits should be stricken,

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recover stipulated attorneys' fees. In this opinion, we refer to these judgments together as the summary judgment.

[2]"Wallace" is used throughout this opinion to include Wallace and RMC, except where Wallace is obviously acting in an individual capacity, such as swearing out an affidavit.

as Brooks's statement did not involve trickery. Therefore, the court struck the affidavits and entered summary judgment on the Note in favor of the FDIC. This appeal ensued.

II.

In reviewing a summary judgment, we apply the same test as did the district court. *Samaad v. City of Dallas*, 940 F.2d 925, 937 (5th Cir.1991). We will affirm a summary judgment when the record evidence shows that there exists "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

Without the parol evidence contained in the affidavits, Wallace is bound by the terms of the Forbearance Agreement and has no issue of law or fact with which to contest summary judgment on either the Note or the counterclaims. With the parol evidence, Wallace may provide sufficient evidence to raise a genuine issue of material fact, namely whether his participation in the Forbearance Agreement was fraudulently induced so that his admission of liability and release of all claims against the FDIC on the Note was ineffective. The application of the Texas parol evidence rule and its exceptions in the promissory note context is crucial to resolving this case.[3]

III.

The Supreme Court of Texas has defined the parol evidence rule a follows: "When parties have concluded a valid integrated agreement with respect to a particular subject matter, the rule precludes the enforcement of inconsistent prior or contemporaneous agreements." *Hubacek v. Ennis State Bank*, 159 Tex. 166, 317 S.W.2d 30, 32 (1958). See also *Brannon v. Gulf States Energy Corp.*, 562 S.W.2d 219, 222 (Tex.1977); *Hunt v. Bankers Trust Co.*, 689 F.Supp. 666, 674 (N.D.Tex.1987).

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[3]The parol evidence rule is a rule of substantive law governing this case. Texas law is applicable under par 12 of the Forbearance Agreement. We therefore apply Texas law. *See Centronic Fin. Corp. v. El Conquistador*, 573 F.2d 779, 782 (2d Cir. 1978).

Texas grants an exception to this bar when a party seeks to offer parol evidence to show fraud in the inducement to enter into a contract. We note, however, that "the exception is narrower when the contract is a promissory note." *Hunt*, 689 F.Supp. at 674. In *Broaddus*, 569 S.W.2d at 494, the Texas Supreme Court held that in order to present evidence contradicting the express terms of a promissory note, the maker must make a preliminary showing that the payee used "some type of trickery artifice, or device . . . in *addition* to the showing that the payee represented to the maker he would not be liable on such note." (Emphasis added.)

Broaddus is applicable to the instant case. In *Broaddus*, three men were co-makers on a promissory note to a bank. After making one partial payment on the note, and receiving an extension on the due date, they made no further payments. The bank filed suit on the note and moved for summary judgment. The makers responded that the bank initially had promised to look to only one of them for payment. The court, holding that the parol evidence rule barred the claim of fraud in the inducement because the makers had made no showing of trickery, affirmed summary judgment in the bank's favor.

Importantly, the Broaddus court supported its decision to require a preliminary showing of trickery in the promissory note context by noting that to do otherwise would lead to "uncertainty and confusion in the law of promissory notes." We reiterated this policy in *Rosas v. United States Small Business Admin.*, 964 F.2d 351, 356 (5th Cir.1992) (per curiam), holding that absent a showing of "trickery, artifice, or device" by the bank, the makers of the note could not introduce parol evidence that they claimed extended the duration of the payout period on the note. We added the following:

> If fraud could be predicated on a party's allegation of any oral promise to vary the express terms of the note, then any collateral parol agreement might be asserted to contradict, vary or even abrogate *any written contract*. The result would destroy the parol evidence rule altogether *resulting in uncertainty and confusion in the law of contracts in general and negotiable instruments in particular.*

Id. (emphasis added) (footnote omitted). In addition, although *Rosas* involved the making of a promissory note, we cited a guarantee agreement case[4] as support for our decision to apply the *Broaddus* rule, thus further showing that we believed the principles implicated in *Broaddus* were not limited narrowly to the making of a promissory note.

Taken together, *Broaddus* and *Rosas* establish the applicability of the "trickery" requirement to the whole negotiable instrument context, not merely the making of a promissory note. An important concern of the *Broaddus* court was the desire to avoid confusion not only in the making of promissory notes, but more importantly, to encourage certainty in the overall law of promissory notes. This desire encompasses the situation at issue here, essentially a modification of a promissory note. Additionally, in *Rosas*, we emphasized our concern about eviscerating the parol evidence rule in the "negotiable instruments" context we did not constrain our fears to the making of a promissory note. Rather, our analysis took us further afield, into the context of guaranty agreements.[5]

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[4]*Simpson v. Mbank Dallas, N.A.*, 724 S.W.2d 102 (Tex.App.-Dallas 1987, writ ref'd n.r.e.).

[5]We note that a split exists among the Texas courts of appeals as to whether the trickery requirement applies to all contract cases or is limited to those in which the contract is a promissory note. Some courts have extended the trickery requirement to an assortment of written contracts. See *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W.2d 754, 759 (Tex.App.-Houston 1982, no writ) (employment contract); *Simpson v. Mbank Dallas, N.A.*, 724 S.W.2d 102, 108 (Tex.App.-Dallas 1987, writ ref'd n.r.e.) (guaranty agreement). Other courts have restricted the requirement to cases involving an allegation of fraud in the inducement of a promissory note. See *Wagner v. Morris*, 658 S.W.2d 230, *232* (Tex.App.-Houston 1983, no writ) (suggesting trickery requirement limited to inducement to sign promissory note); *Lindeburg v. Gulfway Nat'l Bank*, 624 S.W.2d *278*, 281 (Tex.App. Corpus Christi 1981, writ ref'd n.r.e.) (trickery requirement applicable to allegation of fraud in the inducement to sign promissory note). The split may be traced to *Wagner*, 658 S.W.2d at 232, where the court held that the trickery requirement applied only to inducement to sign a promissory note. In a concurring opinion, Chief Justice Evans stressed that the requirement applied to all written contracts. *Id.* at 234.

The case at hand is really about the modification of a promissory note - an act closely related to the making of a promissory note. The disputed Forbearance Agreement required Wallace to relinquish his defenses challenging the validity of the obligation on the Note and pledged additional security on the Note. In exchange, the FDIC agreed to forbear in collecting on the Note, thereby extending the repayment period six months.

Wallace claims fraudulent statements by an agent of the FDIC induced him to accept this modification of the Note. In *Broaddus*, the makers of the note also claimed that fraudulent statements by an agent of the holder induced them to accept the note. The court in *Broaddus* held that, absent a showing of trickery, the parol evidence rule precluded the introduction of the prior allegedly fraudulent statements. We agree, concluding that the parol evidence rule bars the introduction of Wallace's three affidavits unless there is some showing of trickery.

IV

We now turn to the district court's determination that Wallace failed to make the required showing of trickery. Wallace contends that the court impermissibly resolved a disputed issue of material fact by finding that he made no such showing.[6] We disagree.

The *Broaddus* court treated the preliminary showing of trickery as a question of law, not one of fact. Although the issue of whether trickery actually occurred is a question of fact, determining whether the maker of a note has made the requisite preliminary showing of trickery in order to present his

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[6]Wallace relies primarily upon *Hunt v. Bankers Trust Co.*, 689 F.Supp. 666, 674 (N.D.Tex.1987), in which the court noted that "the issue of whether [the payee] engaged in 'trickery' is necessarily one of fact." The *Hunt* court did not mean for this statement to apply to district courts' examinations of whether the maker of a note has made the requisite preliminary showing of trickery necessary to present extrinsic evidence of fraud to the finder of fact. Instead, the statement was made in the context of discovery. Following the above-quoted statement, the court held as follows: "Accordingly, summary judgment may not be granted on the [disputed note and guaranty] before Plaintiffs have had an adequate opportunity to discover any evidence relevant to that issue [trickery]." *Id.*

fraud evidence to the fact finder is a question of law.[7] In *Broaddus*, 569 S.W.2d at 494, the makers of the note offered an affidavit claiming that a bank officer had told them that only one of them would be held liable on the note. The court held that this showing on its own did not suffice to meet the trickery standard and, as the makers had presented no other proof to show the existence of a genuine issue of material fact, summary judgment was appropriate. *Id.*

Likewise, in the instant case, the maker of the Note, Wallace, offered only affidavits tending to show that the FDIC had made oral representations to him that he would not be held liable on the obligation, even though the express terms of the Forbearance Agreement hold him liable. The applicable test requires more: Wallace must have presented evidence that shows that the FDIC employed "some type of trickery, artifice or device . . . *in addition* to showing that [the FDIC] represented to him that he would not be liable" on the Note. *See Rosas*, 964 F.2d at 356. As Wallace has come forward with no evidence that the FDIC employed any trickery, artifice, or device *in addition* to Brooks's representation that the FDIC would not hold him liable when the Note came due, the summary judgment is AFFIRMED.

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[7]If this were not the case, a court rarely would be able to award summary judgment in a *Broaddus-type* case. To suggest otherwise would require a preliminary jury trial on the sole issue of trickery before resolving the merits of a summary judgment motion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
Defendant.	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
Counterclaim Plaintiffs,	§	
v.	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
Counterclaim Defendants.	§	

MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW The Federal Deposit Insurance Corporation ("FDIC") and moves the Court to grant it Partial Summary Judgment against Edward G. Wallace, Jr. ("Wallace") and Republic Mineral Corporation ("RMC"), as follows:

GROUNDS FOR MOTION

1. Pursuant to Federal Rule of Civil Procedure 56, FDIC hereby requests that the Court grant Partial Summary Judgment in favor of FDIC and against Defendants Wallace and RMC on all issues asserted in this case, except (a) the amount of the deficiency for which Wallace and RMC are jointly and severally liable, and (b) the amount of attorneys' fees for which Wallace and RMC are jointly and severally liable. This Motion is supported by the Affidavits of Reno L. Hartfiel and William T. McKinzie which conclusively establish that no genuine dispute exists with respect to any material issue raised by the pleadings of the parties herein except those stated above, and that, therefore, FDIC is entitled to the Judgment against Wallace and RMC requested herein.

2. Alternatively, if the Partial Summary Judgment requested herein is not rendered in favor of FDIC, then FDIC requests that the Court examine the pleadings and evidence and interrogate counsel to ascertain the material facts, if any, which exist without substantial controversy and what material facts are actually and in good faith controverted, and thereafter enter an Order specifying the facts that appear without substantial controversy and direct such further proceedings in this action as are consistent therewith.

NATURE OF FDIC'S CLAIMS

3. FDIC filed this suit to recover judgment against Wallace, and has subsequently filed its claims against RMC, with respect to indebtedness in the original principal amount of $4 million evidenced by a Note executed by Wallace, dated November 30, 1984 ("the Note"). All right, title and interest in and to the Note has been transferred to FDIC. Repayment of the indebtedness evidenced by the Note was and is guaranteed by RMC. As established herein, only the unpaid amount of such indebtedness has not yet been conclusively established.

COUNTERCLAIMS OF WALLACE AND RMC

4. On November 18, 1987, Wallace and RMC filed and served their counterclaims against FDIC and Continental Illinois National bank and Trust Company of Chicago ("CINB"). Wallace and RMC assert that FDIC and CINB have breached a credit agreement, not acted in good faith or dealt fairly, exerted unlawful duress and economic coercion, engaged in fraud and violated the Texas Deceptive Trade Practices Act damaging Wallace and RMC in an amount "which exceeds millions of dollars." Wallace and RMC also seek

rescission of various agreements evidenced by written instruments between the parties as of that date.

SUMMARY JUDGMENT EVIDENCE

5. After the institution of this suit and the counterclaims of Wallace and RMC were filed herein, the parties negotiated, executed and entered into a Forbearance Agreement.[1] In addition, Wallace, FDIC and Partners Title Company (hereinafter "Escrow Agent") executed and entered into an Escrow Agreement.[2] Both the Forbearance Agreement and the Escrow Agreement are effective as of November 30, 1987.

6. Pursuant to the Forbearance Agreement various additional documents were executed by some or all of the parties hereto as the case may be, including a Deed by Wallace to FDIC,[3] a Mutual Release and Covenant Not To Sue ("the Release")[4] and Assignments and Bills of Sale (hereinafter "Mineral Assignments") with respect to property in Ohio and in Louisiana.[5] Pursuant to the Forbearance Agreement and the Escrow Agreement, the Deed, the Release and the Mineral Assignments were delivered to Escrow Agent to be held pending Wallace's payment of the indebtedness not later than 12:00 p.m. C.D.T. on June 1, 1988.

7. In compliance with the terms of the Escrow Agreement, FDIC provided written certification to Escrow Agent more than five days prior to June 1, 1988 as to the "Amount Due" under the Note effective as of June 1, 1988.[6] Escrow Agent did not receive the "Amount Due" or any portion thereof, by 12:00 p.m. C.D.T. on June 1, 1988. Accordingly, as authorized and

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[1]McKinzie Affidavit, Exhibit "1."

[2]McKinzie Affidavit, Exhibit "2;" Hartfiel Affidavit, Exhibit "1."

[3]McKinzie Affidavit, Exhibit "3."

[4]McKinzie Affidavit, Exhibit "4'" Hartfiel Affidavit, Exhibit "3."

[5]McKinzie Affidavit, Exhibit Nos. "5" and "6;" Hartfiel Affidavit, Exhibit Nos. "4" and "5."

[6]McKinzie Affidavit, Exhibit "7;" Hartfiel Affidavit, Exhibit "6."

instructed in the Escrow Agreement, Escrow Agent (i) delivered to each of Wallace, FDIC, CINB and RMC original counterparts of the Release, (ii) filed the Deed for record in the appropriate public records of Harris County, Texas, and (iii) delivered to FDIC original counterparts of the Mineral Assignments with respect to the Ohio and Louisiana properties.[7]

8. The Release, executed by the parties to this agreement and delivered to Escrow Agent on June 1, 1988, provides, in part, as follows:

> "THAT, for and in consideration of good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and confessed, each of the undersigned, Edward G. Wallace, Jr. and Republic Mineral Corporation, a Texas corporation, (each an "Obligor" and together the "Obligors") on behalf of themselves and their successors and assigns, hereby unconditionally and irrevocably compromise, settle and fully release and forever discharge each of the Federal Deposit Insurance Corporation ("FDIC") and Continental Illinois National Bank and Trust Company of Chicago ("CINB"), their respective officers, servants, employees, agents, principals, predecessors, successors and assigns, from any and all costs, expense, claims, damages, demands, actions, causes of action, liability or suits in equity, of whatever kind or nature known or unknown, at law or in equity, in tort, contract or otherwise, which either of them has ever had or may now have or in the future may have against FDIC or "CINB" which in any manner whatsoever may arise, directly or indirectly out of any event, act, circumstance or occurrence occurring prior to November 30, 1987. Each Obligor hereby also agrees not to in any manner whatsoever bring any action, lawsuit, cause of action (whether by way of direct action, counterclaim, crossclaim or interpleader) against either of CINB or FDIC based upon any claim held by either of them and hereby released."

Therefore, each and every claim and cause of action asserted by Wallace and RMC in their counterclaims filed with this Court on November 18, 1987 have been released, settled, discharged and forever barred from assertion. FDIC and CINB are entitled to judgment of this Court so providing.

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[7] See McKinzie and Hartfiel Affidavits.

9. The admissions of Wallace herein conclusively establish execution and delivery of the Note evidencing Wallace's indebtedness to CINB in the principal amount of $4 million, dated August 30, 1984;[8] that the Note was extended on several occasions including that reflected by an Extension Agreement executed by Wallace and RMC on or about November 4, 1986;[9] and that the sums demanded by FDIC have not been paid.[10] Further, the Forbearance Agreement dated November 30, 1987 stipulates and provides, in part, as follows:

> "WHEREAS. Wallace is indebted to FDIC in an aggregate principal amount of FOUR MILLION DOLLARS ($4,000,000) as evidenced by that certain Promissory Note dated August 30, 1984 (the "Note"), executed by Wallace and payable to the order of CINB in the original principal amount of Four Million Dollars ($4,000,000) which along with all collateral security therefor and all rights, privileges and remedies relating thereto has been assigned to FDIC by CINB pursuant to that certain Conveyance dated as of April 14, 1987; and . . .
>
> "WHEREAS, the indebtedness evidenced by the Note has been guaranteed by RMC pursuant to that certain Guaranty dated August 30, 1984 (the "Guaranty") executed by RMC in favor of FDIC (as Assignee of CINB); and . . .
>
> "8. Affirmation. By their execution hereof, each of Wallace and RMC hereby reaffirm their respective obligations under the Note, Guaranty, Deed of Trust, Ohio Mortgage and Louisiana Mortgage, each of which are hereby ratified and confirmed and shall continue in full force and effect, the Parties hereto agreeing that such documents shall continue to be legal, valid, binding and enforceable in accordance with their respective terms."

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[8]Answer of Edward G. Wallace, ¶ 4.

[9]Answer of Edward G. Wallace, ¶ 5.

[10]Answer of Edward G. Wallace, ¶ 8.

10. Wallace and RMC are entitled to credit against the unpaid indebtedness only in amount of 75% of the average of the appraised fair-market value of the properties described in the Deed and Mineral Assignments as of June 1, 1988.[11] Pursuant to the Forbearance Agreement, the Note and the Guaranty, Wallace and RMC remain indebted to pay all expenses of the FDIC, including reasonable attorneys' fees and legal expenses, incurred in endeavoring to collect amounts payable under the Note which are not paid when due. FDIC and CINB are entitled to Summary Judgment of this Court so providing.

WHEREFORE, PREMISES CONSIDERED, FDIC requests that this Motion be submitted in accordance with the Local Rules of Court for the United States District Court, Southern District of Texas, and that upon consideration of same the Court grant FDIC and CINB Partial Summary Judgment with respect to the issues defined hereinabove, or those issues determined by the Court to be without substantial controversy, and hereafter grant FDIC all further relief to which it may show itself justly entitled.

Respectfully submitted,

/s/
Donald F. Hawbaker
Admissions I.D. No.: 3806

ATTORNEY-IN-CHARGE FOR
FEDERAL DEPOSIT INSURANCE
COMPANY

OF COUNSEL:
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(713) 655-0392

---

[11] Forbearance Agreement (McKinzie Affidavit, Exhibit "1"), ¶ 6.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
	§	
Defendant.	§	
	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
	§	
Counterclaim Plaintiffs,	§	
	§	
v.	§	
	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
	§	
Counterclaim Defendants.	§	

ANSWERS AND COUNTERCLAIMS

Edward G. Wallace, defendant, answers plaintiff's Complaint as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

Defendant responds to the separately numbered paragraphs of the Complaint as follows:

1. Defendant, on information and belief, admits the allegations of paragraph 1.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3.

4. Defendant admits that Exhibit "A" to the Complaint is a true and correct copy of a Note he executed on or about August 30, 1984. The Note speaks for itself, and defendant refers to that Note for its terms. Defendant denies all other allegations of paragraph 4.

5. Defendant admits that the Note was extended on several occasions and admits that Exhibit "B" is a true and correct copy of an Extension Agreement executed by him, Republic Mineral Corporation, and Continental Illinois National Bank and Trust Company of Chicago on or about November 4, 1986. The Agreement speaks for itself, and defendant refers to that Agreement for its terms. Defendant denies all other allegations of paragraph 5.

6. Defendant lacks sufficient knowledge and information to admit or deny the allegations of paragraph 6.

7. Defendant lacks sufficient knowledge and information to admit or deny the allegations of paragraph 7.

8. Defendant admits that he has not paid the sums demanded by plaintiff and denies all other allegations of paragraph 8.

9. Defendant admits that he has not paid the sums demanded by plaintiff and that he received the original of the letter dated October 2, 1987, which is attached as Exhibit "D" to the Complaint, and he denies all other allegations of paragraph 9.

10. Defendant denies the allegations of paragraph 10.

Third Defense

Plaintiff has waived its rights, if any, under the Note.

Fourth Defense

Plaintiff is estopped to assert its rights, if any under the note.

Fifth Defense

The default under the Note, if any, has been procured by the fraud and inequitable conduct of plaintiff and its predecessor-in-interest. As a result, plaintiff is barred from enforcing its rights, if any, under the Note.

Sixth Defense

Plaintiff's claims under the Note, if any, are subject to numerous set-offs and counterclaims, as more fully set forth below.

COUNTERCLAIMS

Edward G. Wallace and Republic Mineral Corporation, counterclaim plaintiffs, complain of the Federal Deposit Insurance Corporation and Continental Illinois National Bank and Trust Company of Chicago, counterclaim defendants, as follows:

1. Wallace is an individual residing in Houston, Texas. Republic Mineral Corporation ("RMC") is a corporation organized and existing pursuant to the laws of the State of Texas. All of the stock of RMC is owned by Wallace.

2. The Federal Deposit Insurance Corporation ("FDIC") is a corporation organized and existing under the laws of the United States. It has appeared in this case. Continental Illinois National Bank and Trust Company of Chicago ("CINB") is a national banking association. CINB may be served by serving its agent for service of process, William S. Ogden, 231 So. LaSalle Street, Chicago, Illinois 60697.

3. RMC is engaged in the exploration for and production of oil and gas throughout the United States. For over fourteen years, its financing has been provided in large part by CINB, with which it has also maintained its principal banking relationship.

4. On November 14, 1983, RMC and CINB entered into a revolving credit agreement (the "Credit Agreement"), which was in part an amendment and restatement of prior revolving credit agreements, in which CINB agreed to make loans to RMC in an amount not to exceed the lesser of $30 million or the "Borrowing ease," as computed from time to time under the provisions of the Agreement. A true and correct copy of the Credit Agreement is attached hereto as Exhibit "A."

5. On July 1, 1984, pursuant to the First Amendment to the Credit Agreement (the "First Amendment"), the Credit Agreement was amended to provide that CINB would make loans to RMC in an amount not to exceed the lesser of $50 million or the Borrowing Base, as computed from time to time under the provisions of the Agreement. A copy of the First Amendment is attached hereto as Exhibit "B."

6. At or about the time of the execution of the First Amendment to the Credit Agreement, Wallace owed RMC the sum of $2,500,000. CINB insisted that this receivable be cleared from the books of RMC. To accomplish this, CINB agreed to "lend" Wallace, $4,000,000. The loan was evidenced by the promissory note attached to plaintiff FDIC's Complaint as Exhibit "A", which will hereinafter be referred to as the "Wallace Note." The Wallace Note was guaranteed by RMC, and the proceeds of the loan were used as a payment on behalf of RMC under the Credit Agreement. Moreover, the amount outstanding under the Wallace Note was applied against the Borrowing Base under the Credit Agreement, thereby reducing by $4 million the amount which could be borrowed by RMC under that Agreement.

7. By late 1985, RMC had borrowed approximately $20 million under the Credit Agreement. Pursuant to that Agreement, on or about December 22, 1985, RMC provided to CINB the report of R. A. Lenser and Associates, Inc., independent petroleum engineers, which estimated the reserves and future net income of RMC for the purpose, in part, of establishing the Borrowing Base. That report, dated as of January 1, 1986, reflected future net income from proved developed reserves of over $51.9 million, and from proved undeveloped reserves of over $46.1 million. Shortly after receipt of this document, in early January 1986, representatives of CINB confirmed that RMC's Borrowing Base, as of January 1, 1986, was $34 million.

8. For reasons unknown to Wallace or RMC, CINB soon changed their position. In late February 1986, after having confirmed only a month earlier that RMC's Borrowing Base was $34 million, CLNB inexplicably took the position that the Borrowing Base under the Agreement was only $11.5

million and that the loan was in default because the loan amount exceeded the Borrowing Base. CINB demanded either that RMC reduce the principal or that it put up additional collateral. Negotiations ensued, and Wallace and RMC, in order to avoid CINB's declaring the loan in default and foreclosing on their oil and gas properties, executed a so-called "Limited Waiver Agreement" by which RMC promised to make certain payments to reduce principal. Wallace and RMC were advised by representatives of CINB, however, that the Limited Waiver Agreement was unacceptable to the bank and that CINB had not executed it. So matters stood until R.A. Lenser and Associates completed their reserve report for RMC as of October 1, 1986.

9. The report of R. A. Lenser, dated August 17, 1986, reflected proved producing reserves, as of October 1, of $59.4 million and supported a Borrowing Base under the Credit Agreement of at least $30.2 million. CINB nonetheless persisted in its position, asserting that the Borrowing Base was only $9.5 million, and demanded that RMC and Wallace reduce the amount then outstanding under the Credit Agreement, provide substantial additional collateral (including various real estate owned individually by Wallace) for both loans, and agree to apply virtually all of RMC's income to make monthly principal and interest payments to CINB. These demands were made under the threat of declaring the loans in default and foreclosing on the oil and gas properties securing them -- despite the facts that CINB was fully secured, that the Borrowing Base exceeded the amount outstanding under the loans, and that both Wallace and RMC continued to pay interest when due. Moreover, CINB now claimed that RMC was "in default" because of its failure to comply with the Limited Waiver Agreement -- an agreement that, according to what Wallace and other RMC representatives had previously been told, CINB had never accepted and had not signed. Indeed, CINB had never requested that RMC make any of the payments provided for in the Limited Waiver Agreement and had never before even mentioned RMC's failure to make such payments.

10. RMC and Wallace attempted to resist CINB's unlawful demands, but were forced under the circumstances to enter into a further amendment to the Credit Agreement. Pursuant to this Second Amendment to the Credit Agreement (the "Second Amendment"), a copy of which is attached hereto as Exhibit "C", RMC was forced to agree that CINB had no obligation to loan additional funds under the Credit Agreement for approximately one year, despite its clear obligation to do so, and further to agree that RMC would make principal reductions totaling approximately $1. 4 million during that year, despite the fact that the loans were fully collateralized and that no such reductions were called for by the Credit Agreement. In addition, Wallace was

forced to put up as additional collateral for the Wallace Note two lots located in River Oaks, a subdivision of Houston, totaling approximately 2.14 acres.

11. As a result of these unlawfully-coerced agreements and CINB's total disregard and repudiation of its obligations under the Credit Agreement, RMC was severely damaged. Its ability to develop oil and gas reserves and to carry out its plans for additional development and exploratory drilling was substantially destroyed. This inability to develop its properties, as well as the additional obligations to CINB to which it had been forced to accede in the Second Amendment, put RMC in a totally untenable position. By April 1987, RMC was, for these reasons, unable to meet certain of its obligations under the Second Amendment. CINB then assigned the RMC note to the FDIC.

12. In order to satisfy the FDIC and avoid financial ruin, RMC and Wallace were forced to sell off their oil and gas properties even though the potential of these properties had not been fully developed and even though the market for oil and gas properties was severely depressed. RMC sold its Colorado properties in May 1987, and the majority of its other properties were sold in August. The proceeds from these sales were paid to the FDIC and, despite the circumstances under which the sales were made, the proceeds were sufficient to extinguish RMC's debt to the FDIC. The only debt currently outstanding is the Wallace Note, which CINB also assigned to the FDIC and which is the subject of the current suit.

First Cause of Action

13. Beginning in or about February 1986 and continuing until today, defendants have breached the Credit Agreement by failing and refusing to make loans pursuant to that Agreement. As a direct and proximate result, plaintiffs Wallace and RMC have suffered damages in an amount which cannot presently be determined, but which exceeds millions of dollars.

Second Cause of Action

14. Beginning in or about February 1986 and continuing until today, defendants have breached the Credit Agreement and have not acted in good faith or dealt fairly with plaintiffs by, among other things, ignoring contractual obligations they clearly had, threatening actions they had no authority to take, claiming contractual rights they did not have, and unlawfully forcing plaintiffs to make concessions and waivers of rights. As a direct and proximate result, plaintiffs have suffered damages in an amount which cannot presently be determined, but which exceeds millions of dollars.

Third Cause of Action

15. Defendants unlawfully forced plaintiffs, through duress and economic coercion, to enter into the Second Amendment and, eventually, to virtually liquidate RMC by selling off substantially all of its oil and gas properties at depressed prices. As a result, plaintiffs have suffered damages in an amount which cannot. Presently be determined, but which exceeds millions of dollars. In addition, because defendants acted intentionally and without due regard for the rights of others, plaintiffs are entitled to recover punitive damages.

Fourth Cause of Action

16. Beginning in or about February 1986 and continuing until today, defendants have engaged in a course of conduct which has operated as a fraud upon plaintiffs, including but not limited to the making of false statements and representations about their alleged contractual rights and their intentions in "enforcing" those alleged rights. As a result, plaintiffs have suffered damages in an amount which cannot presently be determined, but which exceeds millions of dollars. In addition, because defendants acted intentionally and without due regard for the rights of others, plaintiffs are entitled to recover punitive damages.

Fifth Cause of Action

17. Beginning in or about February 1986 and continuing until today, defendants have represented that the Credit Agreement and amendments thereto confers or involves rights, remedies, or obligations which it does not have or involve, in violation of sections 17.50(a)(1) and 17.46 of the Texas Deceptive Trade Practices Act (TDTPA). Those representations were a producing cause of actual damages to plaintiffs in an amount which cannot presently be determined, but which exceeds millions of dollars. In addition, because the conduct of the defendants was committed knowingly, plaintiffs are entitled to recover additional damages as provided in section 17.50(b)(2) of the TDTPA.

Sixth Cause of Action

18. Beginning in or about February 1986 and continuing until today, defendants have engaged in an unconscionable action or course of action in violation of section 17.50(a)(3) of the TDTPA. That action or course of action was a producing cause of actual damages to plaintiffs in an amount which

cannot presently be determined, but which exceeds millions of dollars. In addition, because the conduct of the defendants was committed knowingly, plaintiffs are entitled to recover additional damages as provided in section 17.50(b)(2) of the TDTPA.

Seventh Cause of Action

19. Because of defendants' breaches of contract, fraud, duress, economic coercion, and TDTPA violations, the transactions between CINB, RMC, and Wallace of November 4, 1986 -- including, but not limited to, the Second Amendment to the Credit Agreement, and the Deed of Trust and other documents by which the River Oaks lots were pledged as security for the Wallace Note -- should be rescinded.

WHEREFORE, Edward G. Wallace, Jr. and Republic Mineral Corporation request judgment:

(a) on plaintiff FDIC's claim, dismissing the Complaint and awarding Wallace his costs;

(b) on their Counterclaims:

(1) on the First and Second Causes of Action, in the amount of their actual damages, plus attorneys fees and costs;

(2) on the Third and Fourth Causes of Action, in the amount of their actual damages, plus such punitive damages as the jury may award, and costs;

(3) on the Fifth and Sixth Causes of Action, in the amount of their actual damages, plus additional damages as provided in section 17.50(b)(2) of the TDTPA, attorneys fees and costs;

(4) on the Seventh Cause of Action, rescinding the transactions involving CINB, Wallace and RMC, of November 4, 1986;

(5) interest as provided by law; and

(6) for such other and further relief as may be appropriate.

Respectfully submitted,

/s/
Michael M. Wilson
Admissions no. 3495
W. Robert Brown
Admissions No. 5238
MILLER, KEETON, BRISTOW & BROWN
3900 Two Houston Center
Houston, Texas 77010
(713) 759-1234

Attorneys-in-Charge for
Edward G. Wallace and
Republic Mineral Corporation

DEMAND FOR JURY TRIAL

Edward G. Wallace and Republic Mineral Corporation hereby demand trial by jury on all claims and causes of action asserted by or against them in this case.

/s/
Michael M. Wilson
Attorney-in-Charge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
Defendant.	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
Counterclaim Plaintiffs,	§	
v.	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
Counterclaim Defendants.	§	

AMENDED ANSWER OF EDWARD G. WALLACE, JR.

TO THE HONORABLE UNITED STATE DISTRICT JUDGE:

Edward G. Wallace, Jr. ("Wallace"), named as a Defendant herein, answers Plaintiff's complaint as follows:

Specific Responses

1. Upon information and belief Wallace admits the allegations of paragraph 1.

2. Wallace admits the allegations of paragraph 2.

3. Wallace admits the allegations of paragraph 3.

4. Wallace admits that Exhibit A to the Complaint is a true and correct copy of a note he executed on or about August 30, 1984. Since the note speaks for itself, and is the best and is evidence of its terms, Wallace need not respond to any further allegations of paragraph 4.

5. Wallace admits that the note was extended on several occasions and that Exhibit B is a true and correct copy of one such extension agreement executed by him, Republic Mineral Corporation ("Republic"), and Continental Illinois National Bank, and Continental and Trust Company of Chicago ("CINB") on or about November 4, 1986. Since the agreement speaks for itself, and is the best evidence of its terms, Wallace need not respond to any further allegations of paragraph 5.

6. Upon information and belief Wallace admits the allegations of paragraph 6.

7. The legal conclusion in paragraph 7 requires no response of Wallace.

8. Wallace denies the allegations of paragraph 8.

9. Wallace admits receipt of the original letter of which a copy is attached as Exhibit D to the Complaint. Wallace denies all other allegations of paragraph 9.

10. Wallace denies the allegations of paragraph 10.

Affirmative Defenses

11. The Complaint fails to state a claim upon which relief may be granted.

12. The FDIC has waived its rights, if any, under the note, or alternatively, has waived its right to assert that the note is due and payable.

13. The FDIC is estopped to assert its rights, if any, under the note or, alternatively, is estopped to assert that the note is due and payable.

14. Default under the note, if any, has been procured by the fraud and inequitable conduct of the FDIC and its predecessor-in-interest. As a consequence, the FDIC in barred from enforcing its rights, if any, under the note.

15. The FDIC's claims under the note, if any, are subject to set-off and counterclaim, as more fully set forth in Wallace's counterclaim on file herein.

16. The FDIC or its predecessor-in-interest rendered Wallace's performance of his obligations, if any, impossible, and Wallace's performance is therefore excused.

17. The FDIC's conduct in securing a release by Wallace of claims he possessed against the FDIC and its predecessor-in-interest constitute actionable economic duress which is a defense to the enforceability of those releases and grounds for recission of those releases and all other documents executed in connection therewith.

18. Wallace's execution of the releases and other documents executed in connection with the November 30, 1987 Forbearance Agreement was induced by the inequitable conduct of
the FDIC. As a consequence, the FDIC is barred from enforcing those releases or the Forbearance Agreement, which are all void.

WHEREFORE, PREMISES CONSIDERED, Edward G. Wallace, Jr. respectfully prays that the FDIC take nothing by its suit against him, that he

have his costs, and for such other and further relief, general or special, either at law or in equity, to which Wallace may show himself justly entitled.

Respectfully submitted,

/s/
Douglas R. Little
S. D. Tex. No. 1719
Attorney in Charge for
Edward G. Wallace and
Republic Minerals Corporation

OF COUNSEL:

LIDDELL, SAPP, ZIVLEY,
HILL & LaBOON
Texas Commerce Tower
Houston, Texas 77002
(713) 226-1200

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
Defendant.	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
Counterclaim Plaintiffs,	§	
v.	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
Counterclaim Defendants.	§	

AFFIDAVIT OF EDWARD G. WALLACE, JR.

BEFORE ME, the undersigned authority, on this day personally appeared Edward G. Wallace, Jr. who, after having been first duly sworn, upon oath stated and deposed as follows:

> My name is Edward G. Wallace, Jr. and I am a Defendant and Counterclaim Plaintiff in this case. I am also President of Republic Mineral Corporation, also a Defendant and

Counterclaim Plaintiff herein, which has authorized me to make this affidavit as its act and deed. I am over the age of majority and have never been convicted of a felony or crime of moral turpitude. I am competent to testify to, and have personal knowledge of, the matters stated herein. I have read the pleadings filed herein by myself and Republic, being an Answer and Counterclaims, an Answer for Republic, and a response to the Motion for Partial Summary Judgment of the Federal Deposit Insurance Corporation ("FDIC"), and state upon my oath that all statements of fact contained therein are true and correct.

I and Republic have had a borrowing relationship with Continental Illinois National Bank and Trust Company of Chicago ("CINB," the predecessor of FDIC) since 1971. This banking relationship was for the purpose of enabling Republic to engage in substantial oil and gas exploration and production activities in the State of Texas and elsewhere. Since 1971, CINB had been the lead and major bank for Republic, having loaned Republic its working capital funds many times through that period up to 1984 when the final borrowing agreement, in the nature of a revolving line of credit, was established between CINB and Republic. This credit facility, which was at least in part an amendment and restatement of prior credit agreements, provided a line of credit to Republic in an amount not to exceed the lesser of $50 million or the borrowing base, as that borrowing base was computed from time to time pursuant to provisions of the credit agreement. This debt was secured by a collage of producing oil and gas properties located in the States of Texas, Ohio, Louisiana, and Colorado. The borrowing base was a number which was a percentage of the value assigned to these properties by petroleum experts. At about the time of the execution of this credit agreement, July 1984, Republic's borrowing base was $34 million.

At about the time of the execution of this credit agreement, I owed Republic the sum of $2.5 million which I had borrowed from my own company as a method of taking income without double taxation. This was a customary procedure, known to CINB. It was my custom and the custom of Republic to have these intracompany borrowings

repaid every several years by advances against the lines of credit from CINB. At the time of the execution of this credit agreement, however, CINB insisted and demanded that this $2.5 million debt be cleared from the books of Republic. To accomplish this result, CINB agreed to "lend" me $4 million and the note from me to Republic was assigned to CINB. The full $4 million advanced under the "loan," however, was placed directly into Republic and then paid directly back to CINB to reduce its indebtedness. Notwithstanding this fact, the $4 million was debited against the borrowing base thus reducing Republic's line of credit by that amount. Thus, after this transaction, which was structured to appear as a loan to me, the borrowing capacity of Republic was substantially limited.

By late 1985, Republic had outstanding $22 million in borrowings together with the $4 million illusory loan to me, all secured by Republic's oil and gas properties. In December 1985, CINB redetermined Republic's borrowing base from $34 million down to $30 million. At about March 1, 1986, however, CINB unilaterally reduced its assessment of Republic's borrowing base from $30 million to $9.5 million. At that point in time, for reasons unknown to Republic or myself, CINB insisted without discussion that $11 million of Republic's borrowings be immediately repaid. CINB likewise refused to loan any additional funds whatsoever. Although Republic protested that the collateral securing its loans was sufficient to support the pre-existing borrowing base, and with its last remaining funds drilled nine successful gas wells in the Ignacio-Blanco field in LaPlata County, Colorado, adding approximately $20 million in additional reserves to its borrowing base, CINB refused its requests for additional loans or even a moratorium on the $11 million in payments which had been demanded. Such actions essentially would destroy Republic. Therefore, I and Republic, to avoid CINB's declaring the loan in default and foreclosing on Republic's extremely valuable oil and gas properties, executed a so-called Limited Waiver Agreement by which we promised to make certain payments to reduce principal. We were advised, however, that the Limited Waiver Agreement was unacceptable to CINB. Things stood approximately at that point until late 1986 when R. A. Lenser and Associates,

Republic's consultants, completed a reserve report supporting a borrowing base of $30.2 million. CINB unilaterally rejected this report, although it had been accepted in the past, and continued to assert that since the borrowing base was only $9.5 million, Republic and I had to immediately pay $11 million to CINB. CINB further demanded substantial additional collateral and an agreement to apply virtually all of Republic's income to make monthly principal and interest payments. These demands were coupled with a threat to declare the loans in default and foreclose on the valuable oil and gas properties securing them, despite the facts that (a) CINB was fully secured, (b) the borrowing base exceeded the amount outstanding under the loans by a substantial margin, and (c) both I and Republic continued to pay all interest when due. CINB also unilaterally claimed that Republic was in default because of its failure to comply with the Limited Waiver Agreement which CINB had previously rejected as being unacceptable.

It was in this environment that Republic was forced to execute a second amendment to the credit agreement in which it was forced to agree that CINB did not have any obligations to loan additional funds for one year, despite CINB's clear obligation to do so pursuant to the terms of the credit agreement, and further that Republic would make principal reductions totaling approximately $1.4 million during that year despite the fact that the loans in question were fully collateralized and no such reductions were called for by the credit agreement.

As a result of these agreements, coerced by CINB as a consequence of its economic power and after it had placed Republic and me into a position where we were incapable of resisting its demands, Republic was mortally wounded because its ability to develop oil and gas reserves and carry out its plans for additional development and exploratory drilling were destroyed. This inability, which was clearly foreseeable to CINB, as well as the additional obligations which CINB required Republic to accept in the second amendment to the credit agreement, put Republic in a totally untenable position. By April 1987, Republic was predictably unable to meet

certain of the obligations imposed by the second amendment. CINB at that point assigned the Republic note to the FDIC.

The FDIC "bankers" with whom Republic was required to deal at this time were not bankers but liquidators. In the Spring of 1987, up through June 4, 1987, Republic negotiated a sale of its Colorado properties to Quinoco Petroleum for approximately million. Since these properties would need to be released from liens securing the indebtedness to the FDIC, Republic approached FDIC after the sale had been negotiated to secure such a release upon payment to the FDIC of all proceeds. The FDIC refused at that point to permit the sale to be made, instead insisting that the properties be delivered to it in exchange for certain credits against the note in the total amount of $7 million, resulting in a net indebtedness owing to the FDIC after this takeover of Republic's properties of approximately $16 million. Thereafter, the FDIC continued to insist upon further reductions and Republic continued to negotiate sales of its properties since it could no longer operate or develop them. In late Fall 1987, Republic successfully negotiated a sale of its remaining properties to Graham Resources Corporation for an amount in excess of that required to repay the net debt of Republic to CINB and the FDIC. This fully paid off Republic's debt but left no properties generating cash flow with which to repay the additional $4 million in indebtedness which stood in my name but which had been used by Republic with full knowledge of CINB.

At that point, in October 1987, the FDIC first demanded full payment of the $4 million indebtedness, which theretofore had been routinely extended. The FDIC at that time threatened to foreclose upon the River Oaks real estate I had personally pledged. I did not know at that time that those demands were made to put me in a position where, fearing the loss of my River Oaks properties, and the further disruption of my business activities, I would be compelled to execute releases of liability of the FDIC and CINB for the acts of the prior two years. Upon information and belief acquired since November 30, 1987, I believe that this was done for this reason.

In November 1987, I met with Mr. Robert E. Brooks, a Vice President of the FDIC in Chicago to discuss the $4 million indebtedness. I had previously known Mr. Brooks while he was with CINB. Mr. Brooks was quick to allow a six-month postponement of any indebtedness due under the $4 million note, either for Republic or me, so long as the FDIC obtained for itself and CINB a complete release of all claims which I and Republic had against them. At meetings held in Chicago in late November 1987, it was made very clear to me that neither the FDIC nor CINB had hard feelings or wished Republic or me any ill will and, in fact, would always extend my indebtedness upon the same terms and conditions as had existed in the past. Neither I nor Republic had ever made a principal payment on the note since its inception and had only been required to place the River Oaks property as collateral. Based upon that course of dealing and Mr. Brooks' representations that the FDIC would renew the note on the same terms and conditions, notwithstanding what the documents executed in connection with any renewal were to provide, I was induced to execute certain releases which were placed in escrow and delivered to the FDIC on June 1, 1988, along with a deed to the River Oaks property.

Prior to June 1, 1988, when it became apparent that certain financial arrangements I had hoped would be in existence by that time which could be used to assist in payment of the $4 million indebtedness were not available, requested the FDIC to again renew the note upon the existing terms and conditions, as Mr. Brooks indicated would be done. FDIC representatives flatly refused at that time. Subsequent to June 1, 1988, and continuing to the present, we have been compelled to make numerous concessions, have been served with conflicting demands and cumulative demands, and have made substantial offers to renegotiate the $4 million indebtedness on terms far more onerous than those required at any time in the past and far more onerous than those which Mr. Brooks, representing the FDIC, indicated would be required at any time after November 30, 1987. Thus, Republic and I have offered real estate collateral, including the River Oaks property, in an amount equal to $3.8 million (to secure a $4 million indebtedness), and have offered to

make monthly payments to reduce the $4 million indebtedness, servicing both principal and interest. Each request to me to make additional concessions has been met by me but then rejected by the FDIC which has only demanded more. The FDIC has not dealt with me as agreed in November 1987.

The $4 million indebtedness represented by the notes signed by me is a corporate indebtedness which I was required to assume by the bank before it would fund loans which it was required to fund pursuant to the credit agreement. The inability of Republic and me to fully pay these indebtednesses in 1987 was due to the FDIC's actions in unilaterally terminating Republic's credit facilities and compelling it to sell its income producing assets. My execution, for myself and Republic, of the Forbearance Agreement and other documents in November 1987 was induced by representations, made to secure my release of legitimate claims against the bank and FDIC, that the FDIC would continue the bank's practice of renegotiating my debt on the same terms and conditions as had been in effect for three years.

Further, Affiant saith not.

/s/
Edward G. Wallace, Jr.

SWORN TO AND SUBSCRIBED on the 30th day of June, 1988, to certify which witness my hand and seal of office.

/s/
Douglas R. Little
Notary Public for the
State of Texas

My Commission expires 6-6-92

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
Defendant.	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
Counterclaim Plaintiffs,	§	
v.	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
Counterclaim Defendants.	§	

AFFIDAVIT OF D. CHRIS BARDEN

BEFORE ME, the undersigned authority, on this day personally appeared D. Chris Barden who, after having been first duly sworn, upon oath stated and deposed as follows:

My name is D. Chris Barden. I am a vice president of Republic Mineral Corporation ("Republic"),one of the Defendants in this suit. During 1987 and continuing up to the present, I have been involved in the negotiation of the business relationships between both Republic and Edward G. Wallace, Jr. ("Wallace") and the Federal

Deposit Insurance Corporation ("FDIC ") and Continental Illinois National Bank and Trust Company of Chicago ("CINB"). I am over the age of majority and have never been convicted of a felony or a crime of moral turpitude. I am competent to testify to, and have personal knowledge of, the matters stated herein.

I have personal knowledge of the fact that Mr. Wallace has attempted, since November 1987, to negotiate for and secure lines of credit from foreign lenders. I am also familiar with and have personal knowledge of the financial conditions of Mr. Wallace and Republic. Since November 1987, neither Republic nor Mr. Wallace has received any windfall of funds from any source. Additionally, neither Mr. Wallace nor Republic has received lines of credit or other financial arrangements from any lenders, foreign or domestic. Mr. Wallace and Republic requested an extension of the payment date on the $4 Million loan originally made by Mr. Wallace, and guaranteed by Republic, based upon the statements made to us, in my presence, by Mr. Robert E. Brooks on behalf of the FDIC. Mr. Brooks told us he would work with us and allow additional extensions if we were unable to secure our refinancing. It was also because he made those representations that Republic executed releases of its claims. After Mr. Brooks made the representations mentioned, I subjectively believed that the FDIC would in fact carry through with the agreement made by Mr. Brooks.

Further, Affiant saith not.

/s/
D. Chris Barden

SWORN TO AND SUBSCRIBED on the 9th day of September, 1988, to certify which witness my hand and seal of office.

/s/
Notary Public for the
State of Texas

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
Defendant.	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
Counterclaim Plaintiffs,	§	
v.	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
Counterclaim Defendants.	§	

AFFIDAVIT OF ROBERT E. BROOKS

BEFORE ME, the undersigned authority, on this day personally appeared Robert E. Brooks who, after having been first duly sworn, upon oath stated and deposed as follows :

My name is Robert E. Brooks. At all material times during 1987, I worked for the Federal Deposit Insurance Corporation ("FDIC"), administrator of Continental Illinois National Bank and Trust Company of Chicago ("CINB"). In that capacity, I was involved in the negotiation of the business relationships between Republic Mineral Corporation ("Republic") and Edward G. Wallace, Jr. ("Wallace") on one hand and the FDIC and CINB on the other. I am over the age of majority and have never been convicted of a felony or a crime of moral turpitude. I am competent to testify to, and have personal knowledge of, the matters stated herein.

During November 1987, I negotiated an extension of payment of a $ 4 million note which had been assigned to the FDIC by CINB, and which had originally been made by Wallace and guaranteed by Republic. One result of those negotiations was a series of documents including a Forbearance Agreement; an Escrow Agreement providing for an escrow into which were placed other documents executed by the parties; a Deed for Mr. Wallace's River Oaks property which stood as collateral for the $4 million indebtedness, which was deposited into escrow; Mineral Assignments for several oil and gas properties in Ohio and Louisiana, belonging beneficially to Mr. Wallace, which were placed into escrow; a Mutual Release; and several documents executed to resolve disputes over a bankruptcy action filed by certain creditors of Republic in connection with payments owed to them, in their opinion, by a trust set up when the FDIC took over certain of Republic's Colorado properties in 1987.

At the time of the negotiations on behalf of the FDIC with Mr. Wallace, I knew that the $4 million note represented funds which had been used by Republic. I also knew that this note had been extended and renewed several times in the past, because both CINB and the FDIC believed Mr. Wallace could and would eventually pay the note out of cash flow from his oil and gas operations or refinancings, the intended sources of repayment. Only one time was any collateral ever required, and that was when the River Oaks properties were pledged. No pay-downs had ever been required, or were required in November 1987.

The timing of the meeting in November was precipitated by the FDIC's lawsuit (pending in this Court) to collect the $4 million indebtedness and efforts to foreclose on the properties. Although the FDIC did desire to collect the $4 million note, it was willing to renew and extend the note again provided Mr. Wallace and Republic executed complete releases of all their pre-existing claims against the FDIC and CINB.

During the negotiations, I did not request or require any additional collateral or any payment on the $4 million note because neither Mr. Wallace nor Republic had the cash flow with which to make such payments. What was negotiated, instead, was the release of the claims of Republic and Mr. Wallace and an arrangement whereby the River Oaks property was held in escrow. During the negotiations, Mr. Wallace advised that he was negotiating with foreign lenders for lines of credit, to be secured by the properties which remained after Republic sold its major properties in 1987, from which sale the FDIC was paid $16.2 million to apply to Republic's debt. It was from these lines of credit secured by this remainder of property that Mr. Wallace indicated his intent to pay the $ 4 million note. Because it was at least possible, if not likely, that the financing could not be arranged in that short a period of time, I led Mr. Wallace to, believe, and feel he did reasonably believe, that additional renewals would be available if needed in the future. I told Mr. Wallace that we would work with him and intended to require that he and Republic do what they could when future renewals were requested. Thus, if Republic or Mr. Wallace did receive new financing, or a windfall from another source, they would have had to have made payments on the note in relation to the magnitude of the funds available. If, on the other hand, no new financing or other windfall was received before the note came due, it would be renewed.

Further, Affiant saith not.

/s/
Robert E. Brooks

SWORN TO AND SUBSCRIBED on the 7 day of September, 1988, to certify which witness my hand and seal of office.

/s/

B. E. Jungerberg
Notary Public for the
State of Texas

My Commission Expires May 7, 1989

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
Defendant.	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
Counterclaim Plaintiffs,	§	
v.	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
Counterclaim Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Pending before the Court is Plaintiff's Motion for Summary Judgment and Plaintiff's Motion to Strike. The Court held a hearing to resolve these motions. After carefully considering the arguments of the parties and the

applicable law, the Court RECOMMENDS that the motions should be DENIED.

On October 30, 1984, defendant executed a Note in the amount of four million dollars to Continental Illinois National Bank & Trust Co. of Chicago (CINB). The Note was extended three separate times. On the last extension the note became payable on or before April 1, 1987. On April 14, 1987, CINB sold this Note to FDIC, together with all related rights, privileges, remedies, and claims. The Note is presently mature and past due but defendant fails to pay sums owed. Plaintiff FDIC, seeks a judgment against defendant Wallace and defendant Republic Mineral Corp. (RMC) for the principal and interest due under the note and the extension agreement. Defendant filed counterclaims alleging breach of a credit agreement, failure to act in good faith or deal fairly, duress and economic coercion, fraud, and violations of the Texas Deceptive Trade Practices Act.

Plaintiff now moves for summary judgment on all issues in this case except (a) the amount of the deficiency for which Wallace and RMC are jointly liable and (b) amount of attorneys' fees for which Wallace and RMC are jointly liable. Plaintiff alleges that the Forbearance Agreement of November 1987, entered into between the parties provides that each and every claim asserted by Wallace and RMC in their counterclaim have been released, settled, discharged contends that defendants' admitted execution and delivery of the note evidencing Wallace's indebtedness to CINB in the principal amount of four million dollars creates liability. Moreover, the note was extended on several occasions and the sums demanded by FDIC have not been paid.

Defendant urges that summary judgment is inappropriate because genuine issues of material fact are raised, such as:

(1) whether the actions of CINB and the FDIC in creating $4 million note and in compelling the sale by Republic of its income producing properties rendered Wallace and Republic obligations impossible;

(2) whether any default by Wallace and Republic was caused by actions of CINB and FDIC;

(3) whether FDIC has waived or is estopped to assert its rights to collect the note at all or to collect at the resent time;

(4) whether actions by FDIC in November which gave rise to the Forbearance Agreement constitute actionable economic duress;

(5) whether the actions of the FDIC in agreeing to additional renewal and then reneging constitute actionable conduct barring FDIC's assertion of the validity of the Forbearance Agreement. Further, defendants allege that the Forbearance is not fully effective as a matter of law.

APPLICABLE LAW

A grant of summary judgment is appropriate only where it appears from the pleadings, depositions, answers to interrogatories and affidavits - considered in the light most favorable to the opposing party - "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Williams v. Shell Oil Company, 677 F.2d 506, 509 (5th Cir.), cert. denied, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 933 (1982), quoting, Fed.R.Civ.P 56(c); see also, Harrison v. Byrd, 765 F.2d 501, 504 (5th Cir. 1985).

Plaintiffs argue that defendants have not raised any genuine issue of material fact which would preclude summary judgment against them. Plaintiffs contend that the release is clear and unambiguous therefore, its terms cannot be altered by alleged prior oral discussions and negotiations.

The plaintiff relies on the parol evidence rule, which provides that evidence of oral or extrinsic representations made before or contemporaneously with the execution of a written contract is inadmissible for purposes of altering the terms. Brannon v. Gulf States Energy Co ., 562 S.W.2d 219 (Tex. 1977).

However, the parol evidence rule is not without exceptions. In Texas, evidence of oral statements is admissible to show fraud in the inducement. Town North National Bank v. Broaddus 569 S.W.2d 489 (Tex. 1978). In that instance, the fraud alleged must amount to some trickery, artifice, or device employing deception. Id. at 493. In Town North, a bank brought suit against three co-makers of a note and moved for summary judgment. Its proof was an affidavit of one of its officers and a copy of the note in question. The defendants responded by submitting affidavits which questioned their liability to the bank. The District Court granted the summary judgment. The defendant appealed the decision; the Court of Civil Appeals reversed the decision holding that a fact question as to fraud in the inducement was raised. The Texas Supreme Court reversed the Court of Civil Appeals and affirmed the trial court, holding that an "unconditional written instrument cannot be barred or contradicted by parol agreements or by representation of the payee that the maker would not be held liable according to the tenor of the instrument." Town North at 492. While the Court recognized the validity of the fraud-in-

the-inducement exception to the parol evidence rule, it found it inapplicable in that case.

The instant action is distinguishable from Town North because of the nature of the relationship between the parties and quality of evidence submitted by defendants. The evidence shows that the FDIC was closely involved with winding down, refinancing, and paying the business obligations of defendant's business. With regards to this particular note, there is a long history of negotiations between FDIC and plaintiff. In fact, the note had been extended three times previously. Defendants submit to the Court the affidavit of Mr. Robert Brooks, a former employee of plaintiff who was involved in the long-term negotiations between defendant and plaintiffs. See, Brooks affidavit, p. 1, ¶ 1. In his affidavit Mr. Brooks states that, when negotiating the Forbearance Agreement, "he led Mr. Wallace to believe and felt Wallace did believe that additional renewals would be available if, needed in the future. See, Brooks affidavit, p. 3, ¶ 5. Such evidence by an agent of plaintiff may well constitute admissions of a party. Rule 801(d)(2), Fed. R. Evid.

Moreover, the issue of whether the fraud alleged amounts to trickery, artifice, or device employing deception involves a fact question. See, Hunt v. Banker's Trust, 689 F.Supp. 666 (N.D.Tex. 1987). In Hunt, plaintiffs alleged that they relied on various fraudulent promises, misrepresentations, and material concealment in entering their loan agreements. Plaintiffs submitted affidavits alleging that the banks promised that if necessary, revised payment schedules would be negotiated. The Court denied summary judgment holding that the issue of whether Placid Banks engaged in trickery is necessarily one of fact and, therefore, summary judgment was inappropriate. 689 F.Supp. at 674.

Because of the history of their relationship, the affidavit of plaintiff's agent, and the affidavit of defendant Wallace there are substantial, material fact questions regarding the terms, the validity, and perhaps the continued existence of the Forbearance Agreement and the note. Accordingly, it is RECOMMENDED that plaintiffs' Motion for Partial Summary Judgment be DENIED.

The Clerk will file this instrument and forthwith mail a copy to all parties. Within ten days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. 636(b)(1)(C); failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. The original of any written objections shall be filed with the U.S. District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of such

objections shall be mailed to opposing parties and to the chambers of the undersigned, P. 0. Box 61252, Houston, Texas 77208.

DONE at Houston, Texas this 3rd day of August 1989.

/s/
KAREN S. BROWN
UNITED STATES MAGISTRATE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	NO. H-87-3412
EDWARD G. WALLACE, JR.,	§	
Defendant.	§	
EDWARD G. WALLACE, JR., and REPUBLIC MINERAL CORPORATION,	§	
Counterclaim Plaintiffs,	§	
v.	§	
THE FEDERAL DEPOSIT INSURANCE CORPORATION and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	§	
Counterclaim Defendants.	§	

MEMORANDUM AND ORDER

Pending before the Court are the following matters in the above captioned and numbered cause:

1) Amended Objections of the Federal Deposit Insurance Corporation ("FDIC") (#41) to the Memorandum and Recommendation

("Recommendation") (#37) of the United States Magistrate on the Motion for Partial Summary Judgment of the FDIC, the response of Edward G. Wallace, Jr. ("Wallace") and Republic Mineral Corporation ("RMC" or "Republic") thereto (#44), and the FDIC's reply to the response (#47);

2) FDIC's Motion to Strike Affidavit of D. Chris Barden (#17) filed July 19, 1988, response (#20), and supplemental motion (#22);

3) FDIC's Motion to Strike the Affidavits of Robert E. Brooks and D. Chris Barden (#31) filed November 29, 1988; and

4) Motion for Continuance of Consideration of Motion for Partial Summary Judgment and Motion to Strike Affidavit of D. Chris Barden (#23)and response thereto (#25).

The factual basis of this suit is set forth in the Recommendation. All four matters listed above pertain to the Motion for Partial Summary Judgment of the FDIC filed June 3, 1988. For the reasons set forth below, this Court declines to adopt the Recommendation and grants the Motion for Partial Summary Judgment.

I. FDIC'S CLAIM ON THE PROMISSORY NOTE

The FDIC originally filed this suit to recover on a $4 million promissory note signed and executed by Wallace on August 30, 1984, to Continental Illinois Bank & Trust Corp. of Chicago ("CINB"). RMC guaranteed the note. On April 14, 1987, CINB assigned the note to the

FDIC.[1] The FDIC seeks partial summary judgment on all issues in this case except the following:

1) the amount of the deficiency for which Wallace and RMC are jointly and severally liable; and

2) the amount of attorneys' fees for which Wallace and RMC are jointly and severally liable.[2]

Wallace and RMC assert that summary judgment is inappropriate because of the alleged existence of the following genuine issues of material fact:

(1) whether the actions of CINB and the FDIC in creating the $4 million note and in compelling the sale by Republic of its income producing properties rendered Wallace's and Republic's performance of their obligations, if any, impossible;

(2) whether, as a related matter, any default by Wallace and Republic was caused by actions of CINB and the FDIC;

(3) whether the FDIC has waived, or is estopped to assert, its rights to collect the note at all or, alternatively, to assert that the note (and payment under the guaranty) is due at this time, as opposed to a later date;

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[1]The record does not reflect the precise details of the transaction which resulted in the assignment of the note to the FDIC. Wallace's Amended Answer (#15) admits § 6 of the FDIC's Complaint against him (#1), which states that CINB sold to the FDIC the note "'together with all related rights, privileges, remedies and claims." Amended Answer of Wallace at 2, § 6. The FDIC claims that it is a holder in due course of the note. Amended Objections at 2.

[2]Motion at 2, ¶ 1.

(4) whether the actions of the FDIC in November 1987 constitute actionable economic duress, in view of the fact that the economic straits in which Wallace and Republic found themselves were caused by CINB and the FDIC; and

(5) whether the actions of the FDIC in agreeing to additional renewals, and then reneging, constitute actionable conduct barring FDIC's assertion of the validity of the Forbearance Agreement and the mutual releases.

Response to motion at 4-5. The summary judgment evidence submitted with the response to the motion consists of the affidavits of Wallace and of D. Chris Barden, vice president of RMC, filed July 1, 1988. On July 19, 1988, the FDIC filed its motion to strike the affidavit of Barden on the grounds that the affidavit was not based upon personal knowledge, as required by Fed. R. Civ. P. 56(e). In their response to the motion to strike Barden's affidavit, Wallace and RMC admit that the affidavit is "technically objectionable."[3] On August 5, 1988, Wallace and RMC filed a motion for continuance of consideration of both the motion to strike and the motion for partial summary judgment, requesting that the Court not consider those motions until August 31, 1988. The motion for continuance is obviously moot at this time, and the Court grants the FDIC's motion to strike the affidavit of Barden filed July 1, 1988.

On September 12, 1988, Wallace and RMC filed the affidavit of Robert E. Brooks and the second affidavit of Barden. Barden's second affidavit purports to be based upon personal knowledge. Both affidavits describe events which occurred during the negotiations which eventually led to the November 30, 1987, Forbearance Agreement, the validity of which is hotly contested. On November 29, 1988, the FDIC filed its motion to strike these two affidavits. Wallace and RMC did not respond. The FDIC's motion asserts that the affidavits of Brooks and Barden filed September 12, 1988, must be stricken because they contain inadmissible parole evidence of alleged representations of Brooks made during the course of the negotiations to the effect that extensions of the June 1, 1988, maturity date specified in the Forbearance Agreement would ensue if Wallace and RMC requested.

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[3]Response at 2 , ¶ 3.

These two affidavits, however, are relevant only to the issue of the validity of the Forbearance Agreement. They set forth only evidence of the aforementioned negotiations and do not concern the FDIC's affirmative claim on the note. They are therefore irrelevant to the FDIC'S affirmative claim and provide no summary judgment evidence on the existence of any genuine issue of material fact on the note claim asserted by Wallace and RMC in the response to the motion. The resolution of the motion to strike these affidavits is therefore discussed below in the portion of this opinion concerning the validity of the Forbearance Agreement.

The Court must now resolve the question of whether the FDIC is entitled to summary judgment on its affirmative claim. A party seeking summary judgment on a promissory note must establish:

1) the note in question,

2) that the nonmovant signed the note;

3) that it is the legal owner and holder of the note; and

4) that a certain balance was due and owing on the note.

Daniell Motor Co., Inc. v. Northwest Bank, 713 S.W.2d 808, 811-12 (Tex. App.--Fort Worth 1986, no writ). The existence of these elements are indeed proven by the FDIC and are not in dispute. Rather, Wallace and RMC attempt to defeat the motion by raising fact issues listed above.

Since the FDIC has met its summary judgment burden, Wallace and RMC bear the burden of showing the Court a reason why summary judgment should be avoided, and must produce summary judgment evidence in support thereof. Most of the five alleged fact issues asserted by Wallace and RMC are in the nature of affirmative defenses on which Wallace and RMC bear the burden of proof.[4] The affidavit of Wallace is the sole summary

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[4]The Magistrate found that a genuine issue of material fact existed based upon the exception to the parole evidence rule in promissory note cases enunciated in *Town North National Bank v. Broaddus*, 569 S.W.2d 489 (Tex. 1978), and the affidavit of Brooks. Wallace and RMC argue that the Magistrate "properly put the burden of proof on the affirmative defense on the FDIC. " Response of Wallace and RMC to the FDIC's Objections at 2.

judgment evidence in support of his defenses.[5] The Court is of the opinion that the affidavit of Wallace is insufficient summary judgment evidence to support the affirmative defenses. *See Simpson v. Mbank Dallas*, 724 S.W.2d 102, 107-09(Tex.App.--Dallas 1987, writ ref'd n.r.e.). Furthermore, the fourth and fifth alleged issues of fact are, in reality, affirmative defenses to the FDIC's affirmative defense of the Forbearance Agreement; they are not affirmative defenses to the note itself.

II. COUNTERCLAIM OF WALLACE AND RMC

The FDIC raises the existence of the Forbearance Agreement and the Mutual Release and Covenant Not to Sue as an affirmative defense to the counterclaims of Wallace and RMC and argues that those documents entitled it to summary judgment on the counterclaims. For present purposes, the essentials of the Forbearance Agreement are that the FDIC agreed to refrain from foreclosure until June 1, 1988, in exchange for the execution by Wallace and RMC of a Mutual Release and Covenant Not to Sue ("Release"), under the terms of which Wallace and RMC agreed to release and discharge CINB and the FDIC from all claims, causes of action, etc., "which either of them has ever had or may now have or in the future may have against FDIC or CINB which in any manner whatsoever may arise . . . out of any event . . . occurring prior to November 30, 1987:" The Release further provides:

This argument improperly lumps together the FDIC's affirmative claim on the note and the counterclaims of Wallace and RMC. These counterclaims, which are invalid if the Forbearance Agreement stands, do not affect the FDIC's ability to obtain summary judgment on its affirmative claim for the promissory note, as earlier discussed. Moreover, it is Wallace and RMC--not the FDIC--who bear the burden of establishing a genuine issue of material fact on their affirmative defenses to the note. *See Clark v. Dedina*, 658 S.W.2d 293, 297-98(Tex.App.--Houston(1st Dist.] 1983, writ dism'd).

[5]As stated earlier, the affidavit of Barden filed July 27, 1988, is ordered stricken. The September 12, 1988, affidavits of Barden and Brooks do not concern defenses to the note itself, but rather, address the Forbearance Agreement.

> Each Obligor hereby also agrees not to in any manner whatsoever bring any action, lawsuit, cause of action (whether by way of direct action, counterclaim, cross claim or interpleader) against either of CINB or FDIC based upon any claim held by either of them and hereby released.

In regard to a claim of fraud in the inducement of the Forbearance Agreement[6] Wallace and RMC attempt to defeat the Forbearance Agreement, with the affidavit of Brooks and the second affidavit of Barden. As stated earlier, these affidavits purport to describe representations made to Wallace and RMC during the course of negotiations which led to the Forbearance Agreement. The affidavits state that Brooks, the FDIC negotiator who negotiated the Forbearance Agreement, "led" Wallace to believe that additional extensions--beyond June 1, 1988--would be available if needed. The FDIC argues that this evidence is inadmissible parole evidence, citing *Town North National Bank v. Broaddus*, 569 S.W.2d 489 (Tex. 1978).

Broaddus stands for the following: parole evidence is admissible to show fraud in the inducement of a promissory note only if there is some showing of some type of trickery, artifice, or device employed by the payee in addition to the showing that the payee represented to the maker that he would not be liable on the note. Id. at 494. Although *Broaddus,* by its express terms, applies to promissory notes only, Texas courts have applied the rule when fraud in the inducement of other types of contracts is alleged. *See, e.g., Simpson*, 724 S.W.2d at 108.

Under *Broaddus*, this Court concludes that the affidavits of Brooks and Barden constitute inadmissible parole evidence. There is no evidence that the representations of Brooks in the negotiations in question involved the kind of "trickery, artifice, or device" which *Broaddus* requires. Brooks' statement that he "led" Wallace to believe that future extensions would be available involves no more trickery, artifice, or device than the representation in *Broaddus* that the makers of the note would not ultimately be liable. Furthermore, the representation at bar was that future extensions would be available; the representation in *Broaddus* was that payment would never be required. The Court concludes that the affidavits of Brooks and Barden contain inadmissible parole evidence. The affidavits are stricken. There is no summary judgment

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[6]The response to the FDIC's objections, at 4, uses the term "wrongful inducement." It is assumed that fraud in the inducement is the "actionable conduct" referred to in the response to the motion.

evidence which meets the *Broaddus* requirements for showing fraud in the inducement.

Nor is there sufficient summary judgment evidence to create a fact issue as to whether "actionable economic duress" accompanied the negotiations. The requirements of duress are enunciated in *Simpson*, 724 S.W.2d at 109. The affidavit of Wallace fails to set forth evidence of each of the required elements.

III. CONCLUSION

Since there is no genuine issue of material fact regarding either the FDIC's affirmative claim on the promissory note in suit or Wallace's and RMC's counterclaims, the Court grants the FDIC'S motion.

In accordance with the foregoing, it is therefore

ORDERED that the July 19, 1988, motion of the FDIC to strike the affidavit of D. Chris Barden is hereby GRANTED. It is further

ORDERED that the November 29, 1988 motion of the FDIC to strike the affidavits of Robert E. Brooks and D. Chris Barden is hereby GRANTED. It is further

ORDERED that the Motion for Continuance of Consideration is MOOT. It is further

ORDERED that the Motion for Partial Summary Judgment of the FDIC is hereby GRANTED.

Signed this the 14th day of November, 1989.

/s/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	}
Plaintiff	}
VS.	}
EDWARD G, WALLACE, JR.,	}
Defendant	}
	} Civil Action No. H-87-3412
EDWARD G. WALLACE, JR. AND REPUBLIC MINERAL CORPORATION,	}
Counterclaim Defendants	}
VS.	}
THE FEDERAL DEPOSIT INSURANCE CORPORATION AND CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	}
Counterclaim Defendants	}

ORDER

Pending before the Court are the following motions:

(1) Motion for Summary Judgment of the Federal Deposit Insurance Corporation ("FDIC") (#62);

(2) Motion to Strike Affidavit of the FDIC (#68); and

(3) Motion for Leave to File Supplemental Counterclaim of Edward G. Wallace, Jr. ("Wallace"), and Republic Mineral Corporation ("RMC").

I. MOTION FOR SUMMARY JUDGMENT

On November 14, 1989, this Court signed its Memorandum and Order (#50), granting the Motion for Partial Summary Judgment of the FDIC as to the liability of Wallace and RMC on the promissory note made the basis of the motion, and as to Wallace's and RMC's counterclaims against the FDIC. Following that ruling, only two issues remained in this action:

(1) The amount of the deficiency for which Wallace and RMC are jointly and severally liable to the FDIC; and

(2) the amount of attorneys' fees for which Wallace and RMC are jointly and severally liable to the FDIC.

The FDIC now seeks final summary judgment on these two remaining issues. Wallace and RMC have filed their opposition to the motion (#66), to which the FDIC has filed its reply (#68). This Court is of the opinion that the FDIC has met its prima facie burden of demonstrating that it is entitled to summary judgment on the amount of the deficiency which it seeks, and that Wallace and RMC have failed to raise a genuine issue of material fact regarding the amount of the deficiency. The Court, however, is of the opinion that the FDIC has failed to meet its prima facie burden regarding the amount of attorneys' fees to which it is entitled. Accordingly, the Court will set this case for trial on this one remaining issue.

II. MOTION TO STRIKE AFFIDAVIT

In its reply to Wallace's and RMC's response, the FDIC moves the Court to strike a portion of Wallace's affidavit at pages 5-6 of the affidavit because that particular portion expresses Wallace's unqualified opinion concerning the FDIC's appraisals pursuant to the Forbearance Agreement. Even if considered, this portion of Wallace's affidavit does not raise a genuine issue of material fact. This motion is therefore moot.

III. MOTION FOR LEAVE TO FILE SUPPLEMENTAL COUNTERCLAIM

Wallace and RMC also seek leave to assert two supplemental counterclaims against the FDIC:

(1) that the allegedly non-bona fide appraisals which the FDIC obtained constitute a breach of the FDIC's common law duty to perform its contractual duties in good faith; and

(2) that the FDIC's failure to release the mortgage covering the interests which were assigned to it constitutes conversion.

This case is set for docket call on June 1, 1990, and for trial during the two-week period commencing June 4, 1990. This Court is therefore of the opinion that this motion, filed May 14, 1990, is untimely. Moreover, the first claim was raised in opposition to the FDIC's Motion for Summary Judgment, which this Court has held insufficient to raise a genuine issue of material fact.

ORDER

In accordance with the foregoing, it is

ORDERED that the Motion for Summary Judgment of the Federal Deposit Insurance Corporation is hereby GRANTED in part and DENIED in part, and that the Federal Deposit Insurance Corporation have partial summary judgment against Edward G. Wallace, Jr., and Republic Mineral Corporation in the amount of $2,661,478.74 through April 15, 1990, consisting of unpaid principal in the amount of $2,156,933.57, plus interest at the prime rate as periodically charged by CINB, plus 2% interest per annum from June 1, 1988, through April 15, 1990 in the sum of $504,545.17, and interest accruing thereafter at the current per diem rate of $709.13. It is further

ORDERED that the Motion to Strike Affidavit of the FDIC is MOOT. It is further

ORDERED that the Motion for Leave to File Supplemental Counterclaim of Edward G. Wallace, Jr., and Republic Mineral Corporation is hereby DENIED.

Signed this 29th day of May 1990.

/s/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION,	}
Plaintiff	}
VS.	}
EDWARD G, WALLACE, JR.,	}
Defendant	}
	} Civil Action No. H-87-3412
EDWARD G. WALLACE, JR. AND REPUBLIC MINERAL CORPORATION,	}
Counterclaim Plaintiffs,	}
VS.	}
THE FEDERAL DEPOSIT INSURANCE CORPORATION AND CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST OF CHICAGO,	}
Counterclaim Defendants	}

FINAL JUDGMENT

FDIC filed this suit to recover judgment against Wallace and RMC with respect to indebtedness in the original principal amount of $4,000,000 evidenced by a note executed by Wallace, dated November 30, 1984 (the "Note"). All right, title and interest in and to the Note has been transferred to FDIC. Repayment of the indebtedness evidenced by the Note was and is guaranteed by RMC.

Previously, on November 14, 1989, this Court signed its Memorandum and Order (No. 50), granting the Motion for Partial Summary Judgment of the FDIC as to the liability of Wallace and RMC on the Note and Guaranty made the basis of the motion, and finding the FDIC not liable to Wallace and RMC on their counterclaims. Following that ruling, only two issues remained in this action:

1. The amount of the deficiency for which Wallace and RMC are jointly and severally liable to the FDIC; and

2. The amount of attorneys' fee for which Wallace and RMC are jointly and severally liable to the FDIC.

On May 29, 1990, this Court entered its Order granting summary judgment in favor of the FDIC on the amount of the deficiency for which Wallace and RMC are jointly and severally liable to the FDIC. This Court ordered that the FDIC have partial summary judgment against Wallace and RMC in the amount of $2,661,478.74 through April 15, 1990, consisting of unpaid principal in the amount of $2,156,933.57, plus interest at the prime rate periodically charged by CINB, plus 2% interest per annum from June 1, 1968 through April 15, 1990, in the sum of $504,545.17, and interest accruing thereafter at the per diem rate of $709.13 (12% per annum). This Court, however, found that FDIC had failed to meet its prima facie burden regarding the amount of attorneys' fees to which it is entitled.

FDIC and Wallace and RMC have filed a stipulation as to the evidence relating to the amount of attorneys' fees and expenses incurred by FDIC in the prosecution of this lawsuit. While Wallace and RMC do not concede that FDIC is entitled to its reasonable attorneys' fees and expenses, Wallace and RMC stipulate with FDIC that the undisputed evidence supports findings as to the amount of reasonable and necessary attorneys' fees and expenses incurred by the FDIC in the prosecution of this case as follows:

a. $211,684.08 through trial before this Court;

b. The additional sum of $13,500.00 in the event an appeal is successfully defended by FDIC before the United States Fifth Circuit Court of Appeals; and

c. The additional sum of $9,000.00 in the event an appeal or writ of certiorari is successfully pursued of defended before the United States Supreme Court.

Such stipulation is incorporated herein for all purposes by reference and the Court finds such amounts to be the amount of fees which FDIC is entitled to recover. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Federal Deposit Insurance Corporation have and recover of and against Defendants Edward G. Wallace, Jr. and Republic Mineral Corporation, jointly and severally,

(1) The sum of $2,716,790.88 through and including July 2, 1990, consisting of unpaid principal in the amount of $2,156,933.57, plus interest at the prime rate as periodically charged by CINB, plus 2 % interest per annum from June 1, 1988 through July 2, 1990, in the sum of $559,857.31 and interest accruing thereafter at the current per diem rate of $709.13;

(2) The additional sum of $211,684.08 representing the FDIC's reasonable and necessary attorneys' fees for services rendered through the trial of this case as found by the jury; and

(3)) The further sum of $13,500 in the event an appeal is successfully defended by FDIC before the United States Fifth Circuit Court of Appeals, and the further sum of $9,000 in the event an appeal or petition for writ of certiorari is successfully pursued or defended before the United States Supreme Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that FDIC have and recover of and from Defendants Edward G. Wallace, Jr. and Republic Mineral Corporation, jointly and severally, post-judgment interest on the unpaid aggregate of the foregoing sums, at the rate of twelve percent (12%) per annum as provided in the Note, from the date of this judgment until paid in full, plus all costs of court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wallace and RMC take nothing on their counterclaims.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all writs and process for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied. This is a final judgment.

Signed this 31st day of July, 1990.

/s/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

12 U.S.C. § 1819 provides:

(2) Federal court jurisdiction

(A) In general

Except as provided in subparagraph (d), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the district Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Publ. L.85-508, § 12(e), 72 Stat. 348.

Amendment VII of the United States Constitution states:

Amendment VII - Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX M

Rule 56 provides:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

. . . . .

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

. . . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Supreme Court, U.S.
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No. 92-1433

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDWARD G. WALLACE, JR., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly relied on the Texas parol evidence rule to bar the use of affidavits as summary judgment evidence to establish the invalidity of a written agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 975 F.2d 227. The opinion of the district court (Pet. App. I1-I8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1992. The petition for a writ of certiorari was filed on January 19, 1993 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, petitioner Edward G. Wallace, Jr., executed a $4 million promissory note payable to Continental Illinois National Bank (Continental).

Petitioner Republic Mineral Corporation (RMC) guaranteed Wallace's obligation under the note. After the note was extended on three occasions, it finally became due and payable on April 1, 1987. Wallace failed to pay the note at that time. Continental conveyed the note and guaranty to the FDIC on April 14, 1987. The FDIC filed this suit against petitioners on the note and guaranty on October 30, 1987. See Pet. App. A2, H2.

On November 30, 1987, the parties executed several documents—referred to collectively as the forbearance agreement—under which the FDIC agreed to stay its lawsuit until June 1, 1988, to allow Wallace additional time to pay the debt. Pursuant to the forbearance agreement, petitioners reaffirmed their obligations under the note and guaranty, delivered into escrow deeds to certain real property as security for payment of the note, and executed a release of all existing claims against the FDIC and Continental. Pet. App. A2.

Wallace failed to pay the note by June 1, 1988, as the forbearance agreement required. Accordingly, the FDIC reinstated the lawsuit and on June 3, 1988, filed a motion for partial summary judgment, relying on the admissions and release in the forbearance agreement. Petitioners filed counterclaims alleging that Robert Brooks (an FDIC employee) fraudulently induced them to execute the forbearance agreement by assuring them that the note would be extended again on June 1. Petitioners supported the counterclaims with affidavits signed by Wallace, Brooks, and another officer of RMC. The FDIC responded by arguing that the Texas parol evidence rule barred

consideration of the affidavits. See Pet. App. A2-A3, B1-B6, E1-E7, F1-F2, G1-G4.

2. The magistrate recommended that the FDIC's motion for summary judgment be denied. Pet. App. H1-H5. The magistrate stated that applicable Texas law would permit the introduction of parol evidence where there was a showing of "some trickery, artifice, or device," and therefore concluded that summary judgment was not appropriate. *Id.* at H3-H4.

3. The district court rejected the magistrate's recommendation and granted summary judgment for the FDIC. Pet. App. I1-I8. The court explained that under *Town North National Bank* v. *Broaddus*, 569 S.W.2d 489 (Tex. 1978), affidavits are admissible to show fraud in the inducement of a promissory note only if there is some showing of trickery beyond a statement that the makers of the note would not ultimately be liable. Because the alleged representation here—that further extensions would be available—did not establish trickery any more than the statements at issue in *Broaddus*, the court concluded that summary judgment was appropriate for the FDIC as holder of the note. Pet. App. I7.[1]

4. The court of appeals affirmed. Pet. App. A1-A8. Noting that Texas law was applicable under the terms of the forbearance agreement, *id.* at A4 n.3, the court examined the Texas parol evidence rule. The court explained that under *Broaddus*, a party may introduce parol evidence to vary the terms of a contract if

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[1] The opinion discussed in the text did not completely dispose of all claims. The remaining two issues were resolved by two subsequent orders of the district court reprinted at Pet. App. J1-J3, K1-K4.

it is designed to show fraud in the inducement to enter the contract. The court also explained, however, that the Texas Supreme Court has construed the fraud exception to the parol evidence rule quite narrowly in cases involving promissory notes, requiring the maker of the note to "make a preliminary showing that the payee used 'some type of trickery[,] artifice, or device . . . in *addition* to the showing that the payee represented to the maker he would not be liable on such note.'" Pet. App. A5 (quoting *Broaddus*, 569 S.W.2d at 494 (emphasis added by court of appeals)).

The court then turned to its decision in *Rosas* v. *United States Small Business Administration*, 964 F.2d 351, 355-356 (5th Cir. 1992), in which it had suggested that the *Broaddus* requirement was applicable not only to promissory notes, but also to guarantee agreements. Based on that decision, the court reasoned that the "trickery" requirement applies to "the whole negotiable instrument context, not merely the making of a promissory note." Pet. App. A6.

Finally, the court of appeals affirmed the district court's determination that petitioners failed to make the required showing of trickery. Pet. App. A7-A8. The court concluded that "[a]lthough the issue of whether trickery actually occurred is a question of fact, determining whether the maker of a note has made the requisite preliminary showing of trickery in order to present his fraud evidence to the fact finder is a question of law." *Id.* at A7-A8. Otherwise, the court reasoned, a preliminary jury trial on the sole issue of trickery would be required before the

merits of a summary judgment motion could be resolved. *Id.* at A8 n.7. The court concluded that petitioners had come forward with no evidence that the FDIC employed any trickery and accordingly affirmed the district court. *Id.* at A8.

ARGUMENT

Petitioners challenge the decision of the court of appeals on five separate grounds, but do not attempt to overcome the court's understanding of the Texas parol evidence rule. Because petitioners implicitly accept the court of appeals' understanding of the Texas law at issue, there is no basis for review by this Court of the judgment of the court of appeals.[2]

1. Petitioners first contend (Pet. 5) that the district court erred in applying "state rules of procedure" to determine whether summary judgment was proper under Rule 56(c), Fed. R. Civ. P. That claim is meritless. The court of appeals concluded that summary judgment was appropriate because, applying the substantive law of the State of Texas—in this case, the parol evidence rule—there was no genuine issue of material fact. Petitioners do not identify any court that has treated the parol evidence rule as a procedural rule not binding on federal courts in cases where state substantive law applies. In fact, the courts of appeals consistently have applied state parol evidence rules in similar circumstances. See, *e.g.*, *Childers Oil Company* v. *Exxon Corporation*,

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[2] Even if petitioner did challenge the view of Texas law adopted by the district court and the court of appeals, that question would not warrant review by this Court. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 345-346 & n.10 (1976).

960 F.2d 1265, 1269 (4th Cir. 1992); *Advanced Medical, Inc.* v. *Arden Medical Systems, Inc.*, 955 F.2d 188, 195 (3d Cir. 1992); see also *Hubacek* v. *Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958) (parol evidence rule is not a rule of evidence, but a rule of substantive law); *Quitta* v. *Fossati*, 808 S.W.2d 636, 642 (Tex. Ct. App. 1991) (same).

2. Petitioners next argue (Pet. 6-7) that the FDIC failed to meet its initial burden of proof under Rule 56(c), Fed. R. Civ. P., to show the absence of any genuine issue of material fact. In particular, petitioners argue (Pet. 6) that the FDIC failed to provide any evidence that the fraudulent inducement alleged by petitioners did not occur. The problem with that argument is that petitioners would have borne the burden of proof on the fraudulent inducement counterclaims at trial. Accordingly, the FDIC had no obligation to negate those claims in its summary judgment motion; rather, the FDIC was obligated to support its affirmative claims, while petitioners were obligated to support their affirmative defenses and counterclaims. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986). As the lower courts explained, none of the evidence submitted by petitioners on their counterclaims was relevant under the applicable Texas law. Accordingly, it was appropriate for the district court to grant summary judgment for the FDIC.

3. Petitioners also contend (Pet. 7-8) that fraud in the inducement is a valid defense to enforcement of a contract under Texas law and that the affidavits petitioner submitted raised a genuine issue of material fact on that question. Petitioners fail to

address—much less refute—the court of appeals' conclusion that under Texas law a party can establish fraud by means of parol evidence only if it makes a preliminary showing of trickery, artifice, or device. Pet. App. A5. Because petitioners failed to make any showing of trickery, artifice, or device, evidence of an oral representation that the loan would be renewed could not be adequate to establish a genuine issue for trial. Had there been adequate allegations of trickery in addition to the evidence of the oral representation, petitioners would have been entitled to a trial on the questions whether the FDIC in fact used trickery and whether oral representations had been made that fraudulently induced petitioners to execute the forbearance agreement. But because petitioners did not make the requisite allegations, summary judgment for the FDIC was appropriate.

4. Petitioners also argue (Pet. 8-9) that the district court erred by not viewing the evidence in the light most favorable to petitioners and by not indulging every reasonable inference in their favor. Petitioners fail to specify what evidence should have been viewed differently by the district court and what inferences should have been drawn in their favor. Moreover, the petition provides no indication that the district court's actions in that regard raise any legal question of general significance.

5. Petitioners also contend (Pet. 9) that the district court erred in granting the FDIC summary judgment on their counterclaims because the FDIC's summary judgment motion did not address the counterclaims. In fact, the FDIC's motion (reprinted at Pet. App. B1-B6) addressed petitioners' counter-

claims at length. *Id.* at B2-B6 (¶¶ 4-10). In particular, the FDIC argued that "each and every claim and cause of action asserted by [petitioners] in their counterclaims filed with this Court * * * have been released, settled, discharged and forever barred from assertion. FDIC and [Continental] are entitled to judgment of this Court so providing." *Id.* at B4 (¶ 8).[3]

Finally, although petitioners do not present it as a separate question, they contend (Pet. 9) that the district court erred in treating the FDIC's affirmative claims for recovery on the note separately from petitioners' challenge to the validity of the forbearance agreement. That contention is meritless. Petitioners' arguments that the forbearance agreement was invalid offered no reason to doubt the validity of the underlying note and guaranty (which had been executed several years before the forbearance agreement). Accordingly, it was entirely proper for the district court to consider the enforceability of the note and guaranty separately from that of the forbearance agreement. In any event, because both of the lower courts rejected petitioners' challenge to the forbearance agreement, the question whether the challenge would have invalidated the note if it had succeeded is only hypothetical.

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[3] To the extent petitioners attempted to rebut the FDIC's motion for summary judgment by asserting that the forbearance agreement had been fraudulently induced, the FDIC's subsequent pleadings contested that assertion, which could not have been contested until petitioners first raised it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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